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OF TAXES AND DUTIES: TAXING THE SYSTEM WITH PUBLIC EMPLOYEES' TAX OBLIGATIONS

by

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I. INTRODUCTION

Clearly, the tax laws in America are growing increasingly complex.¹ The tax system has steadily become more intricate despite Presidential acknowledgment more than a decade ago that “[t]he system is *too complicated*.”² Yet, the tax laws

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¹ See, e.g., Martin A. Sullivan, *More Complexity, Not Less, Likely from This Year's Tax Bill*, TAX NOTES TODAY, June 20, 1997, available in LEXIS 97 TNT 119-11; see also Marie Cocco, *Capitalizing on the Erosion of Equitable Taxation*, NEWSDAY June 19, 1997, at A53; Vicky Tsilas, *New Tax Expenditures Outnumber Repealed Ones JCT Forecast Shows*, TAX NOTES TODAY, Dec. 10, 1996, available in LEXIS 96 TNT 239-7.

The familiar UNITED STATES CODE SERVICE (U.S.C.S.) series, initially published by Lawyers Cooperative Publishing and now absorbed into the West Group publishing conglomerate, annually issues Title 26 of the United States Code (which is the Internal Revenue Code) in a paperback form instead of the hard bound form used for the other Titles. The other titles can remain useful with an annual pocket part supplement, while Title 26 requires a complete annual revision in order to keep current with the statutory changes and case law developments.

The familiar U.S.C.C.A.N. annual edition of the Internal Revenue Code (sometimes referred to as the “Red I.R.C.”) has grown from a single volume of 1,930 pages in the 1976 edition to two volumes of 1,330 and 1,318 pages, respectively, for the 1997 edition. The U.S.C.C.A.N. companion Federal tax regulations publication (“Red Tax Regs”) has grown even more dramatically over the same period, from two volumes totaling 4,508 pages in 1976 to five volumes of 1,804, 1,707, 1,582, 1,836 and 1,523 pages, respectively, in 1997. The foregoing figures do not include the pages comprising the index or “last minute” materials.

² President Ronald W. Reagan, *The President's Tax Proposals to the Congress for Fairness, Growth and Simplicity 1* (May 1985)[emphasis in original]; see also President Ronald W. Reagan, *Radio Address to the Nation on Economic Growth*, PUB. PAPERS 73, 75

grow increasingly complex and the system becomes more inefficient with each passing year,³ despite acknowledgement from various Governmental officials of the problems associated with tax law complexity.⁴

Governmental agencies, including and especially those involved in the taxation function, have compelling reasons to insist that individuals in their employ comply with the laws of the land, including the personal tax requirements.⁵ As tax law complexity increases, so does the general propensity for noncompliance.⁶ The governmental agencies are thus confronted with increasing volumes of disciplinary issues relating to employee tax obligations. This article will explore how the various types of governmental agencies deal with enforcing compliance by their employees with personal taxation obligations, and will discuss how fallout from the

(Jan. 26, 1985) ("We must follow through on the policies that have given us 25 months of economic growth by simplifying our cumbersome tax codes . . .").

Presidents before (and since) Reagan have likewise expressed high aspirations to simplify American tax laws. See, e.g., President Dwight D. Eisenhower, Annual Budget Message to Congress: Fiscal Year 1960, PUB. PAPERS 36, 41 (Jan. 19, 1959) ("As the budget permits, additional reforms should be undertaken . . . wherever feasible to simplify the [tax] laws.").

³ Cf. 2 IBN KHALDÛN, MUQADDIMAH 89 (F. Rosenthal, trans. Bollingen Ser. XLIII, Pantheon Books, 1958) (c. 1377) (Pagination in original Arabic version: II, 79) ("It should be known that at the beginning of the dynasty, taxation yields a large revenue from small assessments. At the end of the dynasty, taxation yields a small revenue from large assessments.").

⁴ See, e.g. GEN. ACCT. OFF., PUB. NO. GAO/T-GGD-96-100, TAX SYSTEM: ISSUES IN TAX COMPLIANCE BURDEN 4-5 (1996), available in LEXIS 96 TNT 67-20. (stating that the complexity of the Internal Revenue Code, coupled with frequent legislative changes, lead to taxpayer confusion, noncompliance, and impediment of IRS's ability to enforce the tax laws); "A taxpaying public that doesn't understand the law is a taxpaying public that can't comply with the law." *Asides: Tax Revision*, WALL ST. J., Mar. 3, 1987, p. 32, col. 1 (quoting Lawrence Gibbs, former Internal Revenue Commissioner); Tom Herman, *Tax Report: Tax-Law Complexity and Poor IRS Service Draw Fire from an IRS Official*, WALL ST. J., Feb. 12, 1997, at A1, (IRS Taxpayer Advocate Lee R. Monks comments on tax law complexity as cause of most taxpayer problems with the IRS); see also PRESIDENT'S TAX PROPOSALS, *supra* note 2; Shirley D. Peterson, *Death to the Tax Code*, N.Y. TIMES, July 29, 1995, at A2 (Op-Ed page opinion by a former Commissioner of Internal Revenue); Robert Fresco, *Tax Schedule D for Dammit!*, NEWSDAY, Feb. 13, 1998, at A4 (Robert Kobel, long time Public Affairs Officer for IRS Brooklyn District, conceded that even he had trouble understanding the new rules for Schedule D of Form 1040.).

⁵ See *infra* notes 36-42 and accompanying text.

⁶ See *supra* note 4 and accompanying text; *infra* notes 96-107, 142 and accompanying

text.

tax law arena affects the efficiency of government as compliance with the tax laws become increasingly difficult, confusing, and ambiguous.

II. THE STANDARDS TO WHICH PUBLIC EMPLOYEES ARE HELD

A. *The General Duty to File Tax Returns*

In the oft-quoted words of Oliver Wendell Holmes, Jr., “[t]axes are what we pay for civilized society.”⁷ The Internal Revenue Code unequivocally requires individuals whose income exceeds a relatively low threshold to timely file their Federal income tax returns.⁸ Failure to do so can bring significant consequences to

⁷ *Compañía General de Tabacos de Filipinas v. Collector of Internal Revenue*, 275 U.S. 87, 100 (1927) (Holmes, J., dissenting). Mr. Justice Holmes’s insightful words have frequently been quoted in court decisions, in speeches, and in introductions and epigraphs to taxation treatises. See e.g., *Spates v. Montgomery County*, 590 A.2d 1074, 1075 (Md. App. 1991); *Natural Gas Pipeline Co. of America v. State Bd. of Equalization and Assessment*, 466 N.W.2d 461, 472 (Neb. 1991); *City of Philadelphia v. Austin*, 429 A.2d 568, 573 (N.J. 1981) *aff’d* 407 A.2d 568 (N.J. Dist. Ct. 1979); 142 CONG. REC. S7754 (July 11, 1996) (Remarks of Sen. Baucus regarding the Taxpayer Bill of Rights 2); LOUIS EISENSTEIN, *THE IDEOLOGIES OF TAXATION* 5 (1961); DANIEL Q. POSIN, *FEDERAL INCOME TAXATION* p. vii (2d ed. 1993); SIDNEY RATNER, *AMERICAN TAXATION: ITS HISTORY AS A SOCIAL FORCE IN DEMOCRACY* 17 (1942); Lawrence Summers, Deputy Secretary of the Treasury, *Building a Tax System for the 21st Century* (ABA Tax Section Annual Meeting, Aug. 3, 1996), *reprinted in Summers Addresses ABA Tax Section on Tax Reform*, TAX NOTES TODAY, Aug. 6, 1996, available in LEXIS 96 TNT 153-38. The quotation, for all its profound sagacity, is in fact dictum from a dissenting opinion.

In addition to its precedential value as an interpretation of American tax law and its literary value for Mr. Justice Holmes’ gem words of wisdom (not necessarily in that order of importance), the *Compañía General de Tabacos* case is of historical interest as an artifact from the period when the Philippine Islands were under United States sovereignty (1898-1946).

⁸ I.R.C. § 6012 (West 1998). The specific dollar amount varies from year to year and is dependent upon a taxpayer’s filing status which must be determined with reference to other sections of the Internal Revenue Code such as I.R.C. § 151(d) (exemption amount), I.R.C. § 63(c) (standard deduction), I.R.C. § 7703 (definition of marital status). Moreover, the exemption amount set forth in I.R.C. § 151(d) is indexed to economic parameters which vary from year to year, and which require an annual administrative determination of the particular dollar amount.

For the 1997 tax year, the filing threshold ranged from \$2,650 for married taxpayers filing separately to \$13,800 for married spouses, both over age 65, filing a joint tax return. INTERNAL REVENUE SERVICE, PUB. NO. 17, *YOUR FEDERAL INCOME TAX* 5 (1997). For the prior tax year, 1996, the filing threshold ranged from \$2,550 for married taxpayers filing

the individual, both civil⁹ and criminal.¹⁰ Most states have analogous requirements for their own taxes.¹¹

The American system of taxation is based upon self-assessment in the initial filing of the return and calculation of the tax.¹² Such a system can operate only through the enforcement of "strict filing standards."¹³ Truthfulness on the part of the taxpayer is most imperative.¹⁴

Every instance of an individual failing to properly file and pay his or her taxes necessarily shifts additional tax burden to the shoulders of the law-abiding taxpayers.¹⁵ It must nevertheless be remembered that "[a]ny one may so arrange his affairs that his taxes shall be as low as possible; he is not bound to choose that pattern which will best pay the Treasury; there is not even a patriotic duty to increase one's taxes."¹⁶ Indeed, one need not be enthusiastic about paying one's taxes.¹⁷ The universal dislike for paying taxes (and for the governmental authorities

separately to \$13,400 for married spouses, both over age 65, filing a joint tax return. INTERNAL REVENUE SERVICE, PUB. NO. 17, YOUR FEDERAL INCOME TAX 8 (1996).

⁹ I.R.C. § 6651 (West 1998).

¹⁰ See, e.g., I.R.C. §§7201 and 7203 (West 1998).

¹¹ See, e.g., MD. CODE ANN., TAX—GEN. §§ 13-701, 13-1001 to 13-1003 (1997); N.Y. TAX LAW §§ 685, 1801-05 (McKinney 1987); 72 PA. CONS. STAT. ANN. §§ 7352, 7353 (West 1990).

¹² I.R.C. § 6501(a)(1) (West 1998).

¹³ United States v. Boyle, 469 U.S. 241, 249 (1985).

¹⁴ United States v. Taylor, 574 F.2d 232, 234 (5th Cir. 1978), *reh'g denied*, 576 F.2d 931 (5th Cir. 1978), *cert. denied*, 439 U.S. 893 (1978); Sheldon S. Cohen, *Morality and the American Tax System*, 34 GEO. WASH. L. REV. 839 (1966); see also United States v. Bisceglia, 420 U.S. 141, 145 (1975); cf. PLATO, THE REPUBLIC AND OTHER WORKS 27 (B. Jowett, trans.) (DoubleDay Dolphin 1982) ("[W]here there is an income tax, the just man will pay more and the unjust less on the same amount of income."). In the Rouse translation of the same work, the passage is rendered: "[W]hen there are taxes and contributions, the just man will pay more and the unjust less from an equal estate." GREAT DIALOGUES OF PLATO 142 (Eric H. Warmington & Philip G. Rouse, eds. 1956).

¹⁵ See, e.g., United States v. Romero, 640 F.2d 1014, 1016 (9th Cir. 1981); President Dwight D. Eisenhower, Annual Budget Message to Congress: Fiscal Year 1961, PUB. PAPERS 37, 101 (Jan. 15, 1960).

¹⁶ Helvering v. Gregory, 69 F.2d 809, 810 (2d Cir. 1934), *aff'd*, 293 U.S. 465 (1935); cf. Estate of Trompeter v. Commissioner, 75 T.C.M. (CCH) 1653, 1660 (1998) ("One is not required to arrange his or her affairs so that the government will receive more tax than it is rightfully owed. Nor is it fraudulent to construe an ambiguous law in a manner that is adverse to the government.").

¹⁷ One may even write notes and letters expressing disparagement for the IRS. *Belli v.* <http://ideaexchange.uakron.edu/akronlawreview/vol31/iss3/1>

who collect taxes) is certainly an age old human sentiment.¹⁸

Notwithstanding the extremely low popularity of the taxation process, it remains an individual's incumbent duty to timely file and pay income taxes. Every American citizen and/or resident thus has a legal duty to voluntarily file tax returns and to pay taxes owing.¹⁹

Commissioner, 57 T.C.M. (CCH) 1172, 1181 (1989). *But cf.* DAVID BURNHAM, A LAW UNTO ITSELF 70-79 (1989) (describing incidents of excesses and abuses by the IRS against those expressing a desire to not pay taxes.).

¹⁸ "Of all debts, men are least willing to pay the taxes." RALPH WALDO EMERSON, *Politics*, in ESSAYS (1844), reprinted in RALPH WALDO EMERSON, ESSAYS & LECTURES at 567 (Joel Porte, ed. 1983), and in 5 THE HARVARD CLASSICS: ESSAYS AND ENGLISH TRAITS at 247 (Chas. W. Eliot, ed. 1909).

If one is to accept Christian scripture, the apostle Matthew was a publican, a tax collector for the Roman Empire. *Matthew* 10:3. That popular work records the sentiment of the time which clearly viewed publicans as a most unpopular group. *See, e.g., Matthew* 11:19; 21:31-32; *Mark* 2:15; *Luke* 7:34.

When Lawrence Gibbs became the United States Commissioner of Internal Revenue in 1986, he reportedly was asked by his son: "Well Dad, how do you feel being the most disliked person in America?" *Tax Notes*, WALL ST. J., Oct. 26, 1994, at A1.

¹⁹ The American taxation system is based upon voluntary compliance by the taxpayer, and a key element of the IRS mission is to foster voluntary compliance with the tax laws. *See* Donald C. Alexander, Commissioner, *Directive: Organization and Functions of the IRS* § 1111.1 (Mar. 25, 1974), reprinted in 39 Fed. Reg. 11,572 (1974); *see also* 1989-2 C.B. at ii.

"Voluntary" compliance in the context of the tax laws does have an implied element of sheathed compulsion. *See, e.g.,* INTERNAL REVENUE SERVICE, PUB. NO. 1273, GUIDE TO THE INTERNAL REVENUE SERVICE FOR CONGRESSIONAL STAFF at 4 (1996) (SuDoc No. T22.44/2: 1273/996):

Implicit in the [Internal Revenue] Code is Congress' understanding that it expects voluntary compliance with the tax laws. This means that taxpayers are expected to comply with the law without being compelled to do so by action of a federal agent; it does not mean that the taxpayer is free to decide whether or not to comply with the law.

Id.; cf. 2 EDWARD GIBBON, THE HISTORY OF THE DECLINE AND FALL OF THE ROMAN EMPIRE 199 (J. B. Bury, Ed., Methuen & Co., Ltd., London, 6th ed. 1913) (1788), also published as 2 EDWARD GIBBON, THE DECLINE AND FALL OF THE ROMAN EMPIRE 558 (Modern Library, N.Y., n.d. [c. 1932]):

The secret wealth of commerce, and the precarious profits of art or labour, are susceptible only of a discretionary valuation, which is seldom disadvantageous to the interest of the treasury; and as the person of the trader supplies the want of a visible and permanent security, the payment of the imposition, which, in the case

B. The Governmental Interest in Employees' Personal Conduct

The Government's interest in the personal conduct of its employees must be weighed against the employees' personal rights, including those of privacy and due process. It is, of course, axiomatic that a governmental agency can discipline its employees for job-related misbehavior, and indeed, the Government has been upheld in disciplining its employees for diverse offenses, including but in no way limited to theft,²⁰ making false statements on employment applications,²¹ failure to render required reports of personal financial transactions,²² and falsification of travel vouchers and/or time records.²³

It is also well established that the Government must, in order to discipline an employee for off-duty conduct, articulate a "nexus" between the conduct and a governmental interest whereby the misconduct adversely impacts the employee's performance, discredits the Government, or impedes the efficiency of the governmental agency.²⁴ Merely because off-duty conduct is objectionable does not

of a land-tax, may be obtained by the seizure of property, can rarely be extorted by any other means than those of corporal punishments.

Id.; MAIMONIDES, MISHNEH TORAH: SHEKALIM ch. 1, ¶ 9 at 94-95 (Philip Birnbaum, trans., Hebrew Publ. Co., NY, 1967) (c. 1180) (discussing the collection of the half-shekel tax during the existence of the Temple in Jerusalem):

On the first of Adar announcement is made concerning the payment of shekel dues, so that each individual may prepare his half-shekel and be ready to pay it. On the fifteenth of Adar, the money-changers sit down in each town and gently request everyone to pay. They accept from everyone who offers them the half-shekel, without using compulsion against anyone who does not. On the twenty-fifth of Adar, they sit down in the Temple to enforce collection. From then on, payment is obtained by force from those who have not yet paid. Anyone who refuses to pay is subjected to compulsion by levy; a pledge is taken from him forcibly, even the garment he is wearing.

Id.; Rita Zeidner, *From Grizzly to Cuddly*, GOV'T EXECUTIVE MAG., Oct. 1992, at 12, 17 (discussing IRS public relations initiatives and quoting Natwar Gandhi, Associate Director for Tax Policy, U.S. General Accounting Office: "Kind words can do a lot, but kind words and a gun can go a lot further.").

²⁰ See, e.g., *Sears v. Dept. of the Navy*, 680 F.2d 863 (1st Cir. 1982).

²¹ See, e.g., *Williams v. United States*, 434 F.2d 1346 (Ct. Cl. 1970).

²² See, e.g., *Kandall v. United States*, 186 Ct. Cl. 900, 904 (1969), *cert. denied*, 396 U.S. 837 (1969).

²³ See, e.g., *Byrnes v. United States*, 553 F.2d 105 (Ct. Cl. 1977); *Pascal v. United States*, 543 F.2d 1284 (Ct. Cl. 1976); *Birnholz v. United States*, 199 Ct. Cl. 532 (1972).

²⁴ E.g., *Phillips v. Bergland*, 586 F.2d 1007, 1010-11 (4th Cir. 1978); 5 U.S.C. § 7513(a) (1994) (Federal civil service employees may not be disciplined except, "[F]or such cause

give the Government the right to discipline; the Government must also show that the objectionable behavior has a clearly adverse effect upon the agency's mission or operation.²⁵ Moreover, the government is held to various due process matters, including adherence to its own rules and procedures when it imposes discipline upon its employees.²⁶

Notwithstanding the Government's burden of showing the nexus, Government employees are generally held to a somewhat higher standard in their personal actions than are members of the general public. "The peculiar relationship of employer-employee permits the government, when it acts as employer, to exact more of its employees than it may require of the general public."²⁷ Indeed, as far back as the written records reach, governments have imposed upon their servants more stringent restrictions and regulations regarding the conduct of personal affairs than have been imposed upon the ordinary citizens and subjects.²⁸ Moreover, a

as will promote the efficiency of the service.").

Not content to rely upon statute and case law alone, some Federal Government unions have apparently seen fit to specify the nexus requirement in collective bargaining agreements. *See e.g.*, INTERNAL REVENUE SERVICE, NATIONAL AGREEMENT BETWEEN INTERNAL REVENUE SERVICE AND NATIONAL TREASURY EMPLOYEES UNION ("NORD III") Arts. 38.1(C) at p. 59 and 39.1(C) at p. 61 (IRS Document 6647, July 1989) (Adverse actions and disciplinary actions not to be taken against employees "except for such cause as will promote the efficiency of the [Internal Revenue Service].")

The nexus requirement also applies to the various State governments as well. *See, e.g.* Ramirez v. State Personnel Bd., 251 Cal. Rptr. 9 (Cal. Ct. App. 1988); Craddolph v. Ackerman, 385 N.E.2d 1091 (Ohio Ct. App. 1978); Commonwealth Office of the Atty. Gen. v. Colbert, 598 A.2d 344 (Pa. Commw. Ct. 1991), *appeal granted*, 606 A.2d 903 (Pa. 1992), *appeal dismissed as improvidently granted*, 619 A.2d 1062 (Pa. 1993).

²⁵ Compare Wathen v. United States, 527 F.2d 1191, 1201 (Ct. Cl. 1975), *cert. denied*, 429 U.S. 821 (1976) (upholding removal of employee who, in highly publicized case, was acquitted by reason of insanity of murdering his mistress), with Major v. Hampton, 413 F. Supp. 66, 71 (E.D. La. 1976) (refusing to uphold removal of an employee where the employee rented a tryst apartment in the French Quarter of New Orleans, "the city that care forgot," and where the landlord and neighbors condoned the immoral behavior).

²⁶ *See, e.g.*, Service v. Dulles, 354 U.S. 363 (1957); Starzec v. United States, 145 Ct. Cl. 25 (1959). The State and local governments must similarly discipline their employees according to specified and established procedures. *See, e.g.*, Inwang v. Community College Dist. No. 508, 453 N.E.2d 896 (Ill. App. Ct. 1983); McGlone v. City of Philadelphia, 535 A.2d 266 (Pa. Commw. Ct. 1987); Powell v. Brown, 238 S.E.2d 220 (W.Va. 1977).

²⁷ Major v. Hampton, 413 F.Supp. 66, 70 (E.D. La. 1976).

²⁸ *See, e.g.*, CODE OF HAMMURABI, KING OF BABYLON § 38, at 25 (R. F. Harper, trans., U. of Chicago Press 1904) (circa 2250 B.C.) ("An officer, constable or tax-gatherer shall not deed to his wife or daughter the field, garden or house, which is his business (*i.e.*, which is

particular government agency's nature and mission can dictate an especially stringent standard of personal conduct on and off the job,²⁹ and set disciplinary standards for infractions accordingly.³⁰

There is a special obligation on the part of any governmental employee to refrain from off-hours conduct which is directly contrary to the key objectives of the agency by whom he or she is employed.

... [W]here an employee's off-duty behavior is blatantly inconsistent with the mission of the employer and is known or likely to become known, most any employer, public or private, however broadminded, would want to fire the employee and would be reasonable in wanting to do so; and we find no evidence that Congress intended to deny this right to federal agencies. . . . A customs officer caught smuggling, an immigration officer caught employing illegal aliens, an IRS employee who files false income tax returns, a HUD appraiser moonlighting as a "slumlord" — these are merely the public counterparts of a form of conflict of interest that is not less serious for not being financial, that would not be tolerated in the private sector, and that we do not believe Congress meant to sanctify in the public sector.³¹

Indeed, termination of a Federal employee has been upheld for offenses such as a Department of Housing and Urban Development employee moonlighting as a

his by virtue of his office), nor shall he assign them for debt."). Obviously, taxation personnel were to be found in the employ of the governing authorities even as far back as Hammurabi's day.

²⁹ See, e.g., DEFENSE INDUSTRIAL SUPPLY CENTER, DISC: WELCOME TO DEFENSE INDUSTRIAL SUPPLY CENTER at 15 (undated publication of Defense Industrial Supply Center, Phila., PA, handout to new employees, copy on file with author).

We hired you because we believe you have a high level of character and ethical conduct. You are now in the public service and this means that expectations are particularly high. *In addition, you work for a critical defense organization, and you are subject to more restrictions and higher standards of conduct than Federal employees in non-defense agencies.*

Id. (emphasis added).

³⁰ U. S. OFFICE OF PERSONNEL MANAGEMENT, MANAGER'S HANDBOOK at 94 (1979) ("Sometimes also, your agency's mission will require a more severe penalty for the same offense than would be warranted at another agency."); For a discussion on special stringency of conduct expected of employees of the IRS and state taxation agencies, see *infra* notes 36-66.

³¹ *Wild v. United States Dep't of Hous. & Urban Dev.* 692 F.2d 1129, 1133 (7th Cir. 1982).

slumlord,³² an Immigration and Naturalization Service employee who hired illegal aliens,³³ a Customs Officer who used the very illicit drugs his duty was to intercept,³⁴ and a purchasing agent who committed theft.³⁵

C. The Tax Compliance Obligations of Public Employees in a Taxation Agency

The very mission of a taxation authority such as the Internal Revenue Service ("IRS") or an analogous state governmental agency is to administer the tax laws and collect taxes.³⁶ In light of their very missions and functions, the IRS and analogous state governmental agencies have an interest in the tax law compliances of their respective employees. Nonadherence to the tax laws by taxation authority employees strains the morale, order and discipline which must be maintained amongst the ranks of taxation authority personnel in order to ensure the stability of governmental function.³⁷

³² *Id.*

³³ *Wroblaski v. Hampton*, 528 F.2d 852, 854-56 (7th Cir. 1976).

³⁴ *Masino v. United States*, 589 F.2d 1048, 1055-56 (Ct. Cl. 1978).

³⁵ *Sears v. Department of the Navy*, 680 F.2d 863, 867 (1st Cir. 1982). Theft of government property by a government employee is a serious offense, but the fact that the employee was a purchasing agent made his theft of Navy property all the more intolerable. *Id.*; cf. *Portela Gonzalez v. Secretary of the Navy*, 913 F.Supp. 122, 128 (D. P. R. 1996), *aff'd*, 109 F.3d 74 (1st Cir. 1997) (finding that because the employee in question was the sales manager at a Navy Exchange, her commission of theft was especially intolerable, notwithstanding an excellent 29-year employment record).

³⁶ See, e.g. 1995-1 C.B., at ii.

³⁷ See Brief for Respondent at 55, *Kooi v. Chu*, 517 N.Y.S. 2d 601, (App. Div. 1987) (No. 53842) (*reproduced on* Fiche No. 3-87-466, Micro Copy, Inc., Rochester, NY) (Affidavit of Roderick G. W. Chu, New York State Commissioner of Taxation & Finance):

All individuals employed by the Department [of Taxation & Finance] are either directly or indirectly charged with the responsibility of administering and enforcing the State's tax laws. It is vital to the integrity of the Department and to the equitable, fair, and effective administration of the State's tax laws that all officers and employees of the Department performing such duties be above reproach with respect to the requirement to file New York State personal income tax returns pursuant to Tax Law § 651. Toleration of violation by any such officer or employee carries with it the risk of a creeping rot within the Department itself, with a consequent serious adverse effect on the morale of those officers and employees within the Department who are in full compliance with the tax laws.

Id.; For a further discussion of *Kooi*, see *infra* notes 55-58 and accompanying text.

Discord and laxity amongst taxation personnel has long been known to imperil the stability of any governmental regime, democratic or otherwise. See 2 IBN KHALDŪN,

Apart from and in addition to the need for concordant order within the ranks of a taxation authority, public perceptions are obviously vital to fostering the IRS mission of voluntary tax compliance.³⁸ “[I]t is important, if not absolutely necessary, for the integrity and morality of Internal Revenue Service agents to be above reproach at all times. Their honesty and good character are taken for granted and must never be compromised.”³⁹ “The IRS is rightly concerned with its image of honesty and integrity. Members of the public, who must turn square corners in tax matters, demand no less of revenue officers.”⁴⁰ Thus, the IRS strives to avoid even the appearance that it will brook any tax law violation by anyone at any level within its own ranks.⁴¹ Congressional sentiment likewise seems to eschew public perceptions that the IRS might permit such derelictions of personal duty among its troops.⁴²

Accordingly, IRS employees are held to an especially stringent standard to fulfill their duty to timely file proper tax returns.⁴³ For one thing, the IRS employee

MUQADDIMAH 123-24 (F. Rosenthal, trans., Bollingen Ser. XLIII, Pantheon Books, 1958) (c. 1377) (Pagination in original Arabic version: II, 113) (“It becomes common for one tax collector to denounce another, because of their mutual jealousy and envy. . . . The dynasty loses the pomp and magnificence it had possessed through them.”); *see also* 2 M. ROSTOVITZ, THE SOCIAL & ECONOMIC HISTORY OF THE HELLENISTIC WORLD 724-26 (1967) (discussing how conflict and chaos among tax collection hierarchy contributed to the decline and fall of the Ptolemaic dynasty in Egypt).

³⁸ *See, e.g.*, *Monaco v. Department of Treasury, I.R.S.*, 15 M.S.P.R. 727 (M.S.P.B. 1983); *Rotolo v. Merit Sys. Protection Bd.*, 636 F.2d 6, 8 (1st Cir. 1980); President Harry S. Truman, Annual Message to Congress: Fiscal Year 1953, PUB. PAPERS 63, 112 (1953) (“The maintenance of public confidence in the tax collection process is essential to our tax system.”); *see also IRS Chief Taxed by Bashing of Agency*, *NEWSDAY* Jan. 9, 1997, at A41 (IRS Commissioner Margaret Milner Richardson, at an interview following the announcement of her resignation, warned that continued public criticism of the IRS might adversely affect Americans’ willingness to voluntarily comply with the tax laws.).

For further discussion of “voluntary compliance,” *see supra* note 19 and accompanying text.

³⁹ *Kandall v. United States*, 186 Ct. Cl. 900, 904 (1969), *cert. denied*, 396 U.S. 837 (1969).

⁴⁰ *Birnholz v. United States* 199 Ct. Cl. 532, 537 (1972). Notwithstanding the quoted dictum, the *Birnholz* case did not specifically entail any tax return or tax payment irregularities, but did involve, inter alia, the falsification of time reports and travel vouchers by an attorney-accountant employed by the IRS. *Id.*

⁴¹ *Rotolo v. Sys. Protection Bd.*, 636 F.2d 6, 8 (1st Cir. 1980).

⁴² *See, e.g.*, H.R. REP. NO. 104-506, at 52 (1996), *reprinted in* 1996 U.S.C.C.A.N. 1143, 1175.

⁴³ *See, e.g.*, George Guttman, *IRS Employees Less Tax Compliant than Officials Would* <http://ideaexchange.uakron.edu/akronlawreview/vol31/iss3/1>

Rules of Conduct explicitly provide that IRS employees “timely and properly file all required tax returns,”⁴⁴ and pay their just debts, “especially those imposed by law, such as Federal, State and local taxes.”⁴⁵ Noncompliance with their tax duties is grounds for removal of an IRS employee from the Service.⁴⁶ Even where

Like, TAX NOTES TODAY, May 3, 1995, at 597, available in LEXIS 95 TNT 86-3:

The IRS believes that, like Caesar’s wife, its employees should be above suspicion. This means employee tax returns must be timely filed, taxes must be fully paid when due, and there should be no subsequent adjustments that lead to extra tax being owed or a penalty being assessed, according to Darlene Berthod, national director of IRS personnel. . . .

Id. (“The Berthod standard is more stringent than that to which the general population is held”); *see also* INTERNAL REVENUE SERVICE, INTERNAL REVENUE SERVICE HIGHLIGHTS 1989, PUB. NO. 1265 at 21 (1990)

The Internal Revenue Service is a high visibility agency because of its direct contact with nearly every family in America. This makes IRS employees the guardian of an institution that is always on-the-line. People tend to expect more of IRS employees because they are IRS. So does IRS!

Id.; *cf.*, *e.g.*, Taylor v. Department of Justice, 60 M.S.P.R. 686, 693 (M.S.P.B. 1994) (reducing the penalty for failure to file income tax returns from removal to a 90-day suspension where appellant was employed by an agency other than the Internal Revenue Service, and where his duties did not involve the enforcement of the Internal Revenue Code).

The imposition of a rigid disciplinary regime upon those who administer taxation policy did not originate with the IRS, and in fact long predates American law. *See, e.g.*, CODE JUST. 12.62.3 (Gratian & Valentinian 380) in THE CIVIL LAW, v. 15 at 319 (S. P. Scott, trans., photo. reprint, AMS Press 1973) (1932) “Whenever a collector is accused and convicted of depredations, he must suffer the penalty prescribed by law, *without appealing to our clemency*” *Id.* (emphasis added).

⁴⁴ INTERNAL REVENUE SERVICE, RULES OF CONDUCT § 216.7 at 6 (Document 7098) (May 1989), *reprinted in Followup on Investigation of Senior-Level Employee Misconduct and Mismanagement at the Internal Revenue Service: Hearing before the Committee on Government Operations, Commerce, Consumer and Monetary Affairs Subcommittee*, 101st Cong., 2d Sess. 163, 172 (1990) (SuDoc No. Y4.G74/7: EM 7/14).

The first page of IRS Document 7098 entails IRS Form 8556 (Rev. 5/89), “Acknowledgment of Receipt,” which provides for written acknowledgment by the individual IRS employee that he or she received a copy of Document 7098 and is aware of the personal obligation to become familiar with the contents of the document. *Id.*

⁴⁵ *Id.* § 216.6, at 6.

⁴⁶ Rotolo v. Merit Sys. Protection Bd., 636 F.2d 6 (1st Cir. 1980) (IRS employee removed for improper deductions and unreported income); Giles v. United States, 553 F.2d 647 (Ct. Cl. 1977) (IRS employee removed for late filing of Federal tax returns); Dargan v. United States, 529 F.2d 532 (Ct. Cl. 1975) (IRS employee removed for failure to timely file his returns and failing to report all of his income thereon); Hoover v. United States, 513 F.2d

removal from the Service has been found to be overly harsh, the failure of an IRS employee to file proper tax returns is a serious offense⁴⁷ for which some form of punishment is warranted.⁴⁸ An IRS employee's improper filing (or nonfiling) of an analogous state income tax return is equally sanctionable conduct.⁴⁹ Moreover, IRS

603 (Ct. Cl. 1975) (IRS employee whose duties entailed screening tax returns for improper deductions removed for taking improper deductions on his own return); *Micali v. Department of the Treasury*, 56 M.S.P.R. 127 (M.S.P.B. 1992), *aff'd*, 11 F.3d 1070 (Fed. Cir. 1993) (GS-9 Taxpayer Service Specialist removed for failure to include income of spouse on joint return for 4 years); *see also* *Hobbs v. United States*, 97-2 U.S.T.C. (CCH) § 50,965 (S.D. Tex., No. Civ. H-96-4260, 11/3/97) (discharged I.R.S. employee litigating disclosure issues arising from his discharge for failure to properly file his tax returns and pay his taxes: in addition to tax irregularities, the I.R.S. employee in question apparently failed to pay his child support obligations).

⁴⁷ The failure to timely *pay* taxes when due is not as serious as failure to file and/or failure to accurately report one's income. *Gibbs v. Dept. of Treasury*, 21 M.S.P.R. 646, 650 (M.S.P.B. 1984); *Davis v. Dept. of Treasury*, 8 M.S.P.R. 317, 321 (M.S.P.B. 1981). The penalty assessed by the IRS upon a taxpayer for failure to timely file a tax return is 5% per month or fraction thereof, while the failure to timely pay a tax is 0.5% per month or fraction thereof. I.R.C. § 6651 (West 1998).

⁴⁸ *Boyce v. United States*, 543 F.2d 1290 (Ct. Cl. 1976). The penalty of removal from the Service was found to be disproportionately harsh under the circumstances in view of the fact that the employees in question, who failed to timely file, were female GS-2 and GS-3 grade employees who depended upon their respective husbands to file a joint return. *Id.* at 1291. The court nevertheless acknowledged that some form of punishment must be meted out to the employees. *Id.* at 1293.

In determining the appropriate degree of punishment (there being no question as to whether to punish), it is perfectly appropriate for the IRS and other Federal agencies to hold higher ranking employees to higher standards. *Compare* *Monterosso v. Department of the Treasury*, 6 M.S.P.R. 684 (M.S.P.B. 1981) (GS-3 mail clerk), *with* *Monaco v. Department of Treasury, I.R.S.*, 15 M.S.P.R. 727, 730-31 (M.S.P.B. 1983) (GS-9 employee having personal contact with taxpayers was removed); *see also* *Gipson v. Veterans Admin.*, 682 F.2d 1004, 1011 (D.C. Cir. 1982); *Brewer v. United States Postal Serv.*, 647 F.2d 1093, 1098 (Ct. Cl. 1981), *cert. denied*, 454 U.S. 1144, (1982); *Caster v. Department of the Army*, 62 M.S.P.R. 436 (M.S.P.B. 1994), *aff'd sub nom* *Manning v. Merit Sys. Protection Bd.*, 59 F.3d 180 (Fed. Cir. 1995) (Federal agencies justified in holding a higher ranking and supervisory employees to a more stringent standard of conduct).

It is likewise appropriate for State agencies to hold higher ranking employees to higher standards of conduct. *See, e.g.,* *Woodbridge v. Commw. Department of Revenue*, 435 A.2d 300, 302 (Pa. Commw. Ct. 1981).

⁴⁹ *Cf. Danese v. Internal Revenue Serv.*, 11 M.S.P.R. 97 (M.S.P.B. 1982). In *Danese*, the IRS failed to demonstrate that the employee in question did in fact have an obligation to file a Mississippi state income tax return in view of factual questions, including the employee's claimed residence in Louisiana. *Id.* at 99. Had the IRS shown that the

agents and employees are held to a higher standard when their own tax affairs come before the courts.⁵⁰

Though the IRS is in many respects the most visible, feared and despised branch of the Treasury Department,⁵¹ taxation is not the Treasury's sole function.⁵² Treasury employees working in nontaxation functions are not subject to public

employee did in fact neglect his state tax filing responsibilities, however, there is little question that the discipline imposed upon the employee would have been sustained. *Id.*

Indeed, Federal law statutorily provides that Federal employees who reside and/or are employed on Federal installations or other Federal areas are not excused by reason thereby from income tax obligations imposed by the states and/or cities in which such Federal areas are situated. 4 U.S.C. § 106; *see also* Application of Thompson, 157 F. Supp. 93 (E.D. Pa. 1957), *aff'd sub nom*, United States *ex rel.* Thompson v. Lennox, 258 F.2d 320 (3d Cir. 1958), *cert. denied*, 358 U.S. 931 (1959); Kiker v. Philadelphia, 31 A.2d 289 (Pa. 1943), *cert. denied*, 320 U.S. 741 (1943).

⁵⁰ *See, e.g.*, Beretta v. Commissioner, 74 T.C.M. (CCH) 1467 (1997); Theisen v. Commissioner, 74 T.C.M. (CCH) 1327 (1997); Crismali v. Commissioner, 69 T.C.M. (CCH) 1579 (1995); Goldenberg v. Commissioner, 65 T.C.M. (CCH) 2338 (1993); Addison v. Commissioner, 63 T.C.M. (CCH) 3157 (1992); Langer v. Commissioner, 63 T.C.M. (CCH) 1900 (1992), *aff'd*, 989 F.2d 294 (8th Cir. 1993); Langer v. Commissioner, 59 T.C.M. (CCH) 740 (1990), *aff'd*, 980 F.2d 1198 (8th Cir. 1992); *see also* Kale v. Commissioner, T.C. Memo 71 T.C.M. (CCH) 2854 (1996) (involving tax consequences of bribes taken by former IRS Agent during his employ with the IRS. The court noted that he had reached "the highest possible grade allowed to non-management agents," and that he was fully aware that his conduct was illegal, ergo, a fraud penalty was imposed.).

Interestingly, the courts apparently continue to hold former IRS agents and employees to a higher standard in the conduct of their personal tax affairs which arise after they depart from the employ of the IRS. *See, e.g.*, United States v. Nunan, 236 F.2d 576 (2d Cir. 1956), *cert. denied* 353 U.S. 912 (1957); Price v. Commissioner, 73 T.C.M. (CCH) 1906 (1997), *aff'd*, 142 F.3d 440 (7th Cir. 1998); Grossman v. Commissioner, 72 T.C.M. (CCH) 845, 882-83 (1996); Sisson v. Commissioner, 72 T.C.M. (CCH) 200, 202 (1996); Shapiro v. Commissioner, 67 T.C.M. (CCH) 2389 (1994).

The standard to which the courts hold former IRS agents obviously impacts the standard to which IRS tax examination personnel will hold their former colleagues in personal tax examination situations.

⁵¹ *See generally* DAVID BURNHAM, A LAW UNTO ITSELF (1989); *see also* 142 CONG. REC. S10547-49 (daily ed., Sept. 13, 1996) (remarks of Sen. Coverdell).

⁵² The Treasury's other functional entities include, but are not limited to, the U.S. Secret Service, Office of Thrift Supervision, the U.S. Mint, Bureau of Printing & Engraving, and the Comptroller of the Currency, as well as headquarters administrative staff functions. *See, e.g.*, THE UNITED STATES GOV'T MANUAL 1997/1998, at 438-51 (1996), *available in* 1996 WL 616334.

image and internal order concerns in quite the same way as their colleagues at the IRS.⁵³ On the other hand, Treasury officials who occupy high and visible positions are subject to heightened tax compliance obligations by virtue of holding such positions.⁵⁴

The same considerations for holding IRS agents to a stringent standard in their personal tax affairs also apply to employees of state and local taxation authorities. In one illustrative case, *Kooi v. Chu*,⁵⁵ the New York State Department of Taxation and Finance, under a new Commissioner who sought to reinvigorate a policy grown lax, implemented a 3-step process with respect to those of its employees it identified as nonfilers of New York State Income Tax returns: first, a relatively friendly reminder letter was sent to all identified nonfiler employees, who were given the opportunity to file or to explain the apparent nonfiling; second, those who did not respond to the first step were called in for interview, with simultaneous imposition of a one month suspension and a specified deadline by which to comply with the filing requirements; third, those who did not comply by the deadline would be dismissed. Despite the clear opportunity for nonfilers to file delinquent returns and thus continue their employment, thirty five Department employees failed to so file after the clearly specified deadline, including eleven Tax Compliance Agents, three Excise Tax Investigators and four Audit Clerks.⁵⁶ These employees have an

⁵³ *But see*, Crawford v. Department of the Treasury, 56 M.S.P.R. 224, 237 (M.S.P.B. 1993) (ordering a lesser degree of discipline for a Treasury Department police officer who failed to file tax returns than he would have received had he been working in a taxation function).

⁵⁴ *See, e.g.*, *Former United States Treasurer Gets Prison Term for Tax Fraud*, NEW YORK TIMES, Sept. 14, 1996, at A12. Former United States Treasurer Catalina Villalpando was sentenced to prison time for a tax fraud conviction. *Id.* The sentencing judge declined to impose an alternative to incarceration, finding that Ms. Villalpando's position imposed a special duty upon her to personally comply with the tax laws. *Id.*; cf. *In re Anderson*, 536 N.Y.S. 2d 765 (App. Div. 1989). In disbaring an attorney from practice in New York, the Court weighed as particularly egregious his violations of the federal banking laws which the attorney, when he previously occupied the Cabinet post of Secretary of the Treasury, had the specific duty to apply and enforce. *Id.* Obviously, a current or former Secretary of the Treasury would be held to similar stringencies if he or she were to violate the Internal Revenue Code, another key statute which the Secretary of the Treasury has the duty to apply and enforce. *See supra* note 48 (regarding higher-ranking employees being held to more stringent standards.).

⁵⁵ 517 N.Y.S. 2d 601, 602-03 (App. Div. 1987); *see also* Brief for Respondent at 49-50, *Kooi* (No. 53842), *microformed on* Fiche No. 3-87-466 (Micro Copy, Inc., Rochester, NY) (Affidavit of Roderick G. W. Chu).

⁵⁶ Brief for Respondent at 28-29, *Kooi* (No. 53842).
<http://ideaexchange.uakron.edu/akronlawreview/vol31/iss3/1>

official duty to “directly monitor tax compliance by other taxpayers.”⁵⁷ The new Department administration found it imperative that such employees be removed to maintain internal order within the Department and public confidence and tax compliance outside the Department.⁵⁸

The case of *Department of Revenue v. Smith*,⁵⁹ has a fact pattern which stretches to the greatest extreme. The *Smith* case is quite instructional regarding official policy on the personal tax obligations of the Illinois Department of Revenue, and the inconsistent enforcement thereof, during the early to mid 1980's. Thomas J. Smith was not a rank-and-file employee of the Illinois Department of Revenue; he was a high level supervisor and the liaison between the IRS and the State for the specific purpose of coordinating tax enforcement.⁶⁰ Admittedly, Smith knew well that Department policy required all employees to file their state tax returns and subjected violators to dismissal, yet Smith failed to file his Federal and State tax returns for 1982 and 1983.⁶¹ The Department of Revenue sought to terminate Smith's employment, but the Illinois Civil Service Commission reduced the penalty to a ninety-day suspension, noting the diverse inconsistency with which the Department had enforced its policy in the past.⁶²

The ninety-day suspension in the *Smith* case seems, on its face, to be relatively mild in light of Mr. Smith's rank and responsibilities, and in light of the fact that the IRS District Director specifically informed the Director of the Illinois Department of Revenue that the IRS “could no longer work with [Smith] as a liaison person” in light of Smith's nonfiling of his Federal tax returns.⁶³ However, as the investigation developed, Mr. Smith was ultimately removed from his position with the Illinois Department of Revenue, albeit indirectly, via nonreappointment according to the applicable Illinois civil service laws.⁶⁴

Smith and *Kooi* stand together for government agency executives as contrasting exemplars in the craft of public personnel administration. On one hand, the Illinois

⁵⁷ *Id.* at 54.

⁵⁸ *See id.* at 55-56.

⁵⁹ 501 N.E.2d 1370 (Ill. App. 1986), *appeal denied*, 508 N.E.2d 726 (Ill. 1987).

⁶⁰ *Id.* at 1373.

⁶¹ *Id.*

⁶² *Id.* at 1379.

⁶³ *Id.* at 1375.

⁶⁴ *See Smith v. United States*, 723 F. Supp. 1300, 1303 (C.D. Ill. 1989), *modified on other grounds*, 964 F.2d 630 (7th Cir. 1992), *cert. denied*, 506 U.S. 1067, (1993) (Smith unsuccessfully sued the IRS District Director for disclosing Smith's tax return information to Smith's superiors at the Illinois Department of Revenue.).

Department of Revenue's lax and inconsistent enforcement practices in *Smith* made it difficult for that agency to effect a clean and orderly termination of an errant, high-level employee whose egregious misbehavior cried out for swift, visible, and definitive punishment. On the other hand, the New York State Department of Taxation and Finance's systematic, proactive and uniformly-applied initiative to reanimate its disused rules gave it sufficient underpinning to begin strict enforcement of its stated policies without contramand by an appellate tribunal.

Taxation personnel in other states seem to be effectively held, to varying degrees, to an enhanced standard with respect to their personal tax affairs.⁶⁵ Public policy considerations obviously impart a special cogency for bureaucrats working in taxation bureaucracies to comply with tax laws.

D. The Tax Compliance Obligations of Public Employees in Other Agencies

Personal tax compliance lapses of public servants employed by nontaxation agencies do not carry as many of the negative implications as when committed by

⁶⁵ Responses to informal Internet e-mail inquiries by the author seem to confirm that the various State taxation authorities require their employees to file their tax returns, and seem to enforce that requirement to varying extents from jurisdiction to jurisdiction. *E.g.*, E-mail from Carol Deatherage, Arizona Department of Revenue (position and rank unknown) to Kenneth Ryesky, Adjunct Assistant Professor, Queens College CUNY (Aug. 30, 1996) (on file with author). ("In the state of Arizona it is mandatory that all Dept. of Revenue employees files [sic] their taxes. It is checked each year to make sure we are filed, [sic] and failure to file is grounds for termination. Before we are hired we have a background check which includes filing of taxes."); E-mail from Madelon Barton, State of Washington, Department of Revenue (position and rank unknown) to Kenneth Ryesky, Adjunct Assistant Professor, Queens College CUNY (Sept. 26, 1996) (on file with author). (The State of Washington has no income tax, but state employees who operate their own businesses may be disciplined for not complying with business taxation requirements.); E-mail from Ellen Rhorer, Louisiana Department of Revenue & Taxation (position and rank unknown) to Kenneth Ryesky, Adjunct Assistant Professor, Queens College CUNY (Sept. 20, 1996) (on file with author). (The Department's Standards of Conduct for Employees require that all Federal and state tax returns be timely filed and paid, and in the case of a good faith dispute, an appeal must be pending before the appropriate authority. Filing history is verified for new employees.); E-mail from Thomas Fonfara, Wisconsin Dept. of Revenue (Executive Assistant) to Kenneth Ryesky, Adjunct Assistant Professor, Queens College CUNY (Sept. 19, 1996) (on file with author). ("The Wisconsin Department of Revenue does require all employees, at risk of discipline, to file required tax returns. While rare, we have disciplined employees, ranging from verbal warnings to termination, for violation of work rule #1, 'Failure to file all required Wisconsin tax forms in a timely manner.'").

employees of the IRS or state taxation authorities.⁶⁶ Nevertheless, the government does have the right to expect all of its employees to comply with the tax laws. Federal employees in the Executive Branch are specifically expected to meet their just financial obligations,⁶⁷ including and especially their Federal, State and local taxes.⁶⁸ The IRS reportedly assigns a special selection code to classify the tax

⁶⁶ See, e.g., *Taylor v. Department of Justice*, 60 M.S.P.R. 686, 693 (M.S.P.B. 1994) (finding that because appellant was employed by an agency other than the IRS, the Board reduced the penalty for failure to file income tax returns from removal to a ninety-day suspension); *Mitchell v. United States Postal Serv.*, 32 M.S.P.R. 362, 365-66. (M.S.P.B. 1987) (evading taxes and submitting false W-4 Forms found not to be an embarrassment to the Postal Service, thus reducing penalty from removal to sixty-day suspension).

⁶⁷ *Phillips v. General Servs. Admin.*, 878 F.2d 370, 374 (Fed. Cir. 1989) (upholding reprimand of Federal employee whose credit card account was 120 days delinquent); 5 C.F.R. § 2635.809 (1996).

It is noteworthy that the credit card in the *Phillips* case was a special Diners Club card issued to Federal employees and intended for the charging of reimbursable official expenses, with the individual employee being liable to Diners Club for all charges made against the account and which, if the charges were proper, would be reimbursed by the Government to the employee in time to pay the Diner's Club bill without any delinquency. *Phillips*, 878 F.2d at 371. The Federal Government entered into the arrangement with Diners Club (and other credit card providers) in order to simplify its paperwork and improve its cash flow situation. *Id.* at 374. The misuse of such credit cards by Government employees is a recurring problem; a disadvantageous side effect which accompanies the Government's approach to eliminating the paperwork and cash flow costs associated with covering the travel costs of its employees through normal fiscal channels. See, e.g. Maj. Jane M. E. Peterson, *American Express Travel Card Abuse: Can We Control the Problem?*, TIG BRIEF, July-Aug. 1996, at 18; *Have Card, Will Charge*, GOV'T EXECUTIVE, Oct. 1996, at 6.

⁶⁸ "Employees *shall* satisfy in good faith their obligations as citizens, including all just financial obligations, especially those — such as Federal, State or local taxes — that are imposed by law." Exec. Order No. 12,674, § 101(l), 54 Fed. Reg. 15,159 (1989), *reprinted as amended* in 5 U.S.C.A. § 7301, app. at 170-71 (West 1996). The wording of the analogous predecessor provision in the now superseded regulation stated that "[a]n employee *is expected to* meet all just financial obligations, especially those — such as Federal, State or local taxes — that are imposed by law." Exec. Order No. 11,222, § 205, 30 Fed. Reg. 6469 (1969) (emphasis added). While the polite diplomatic language of the predecessor provision might arguably have accommodated some ambiguity, the blunt directive language in Exec. Order No. 12,674 unequivocally and emphatically requires Federal employees to meet their personal tax obligations.

In the past, the salaries of Federal employees were exempt from state taxation. See, e.g., *Dobbins v. Commissioners of Erie Co.*, 41 U.S. (6 Pet.) 435 (1842). By 1939, several exceptions had been carved out. See, e.g., *Graves v. New York*, 306 U.S. 466 (1939). Beginning in 1941, Congress specifically permitted states to tax the salaries of Federal

returns of Federal employees, effectively imposing upon such returns a closer degree of scrutiny.⁶⁹

One court decision has characterized the understatement of taxable income by an IRS employee (and, presumably, any other Federal employee) as a falsification of a government record,⁷⁰ an offense of grave import in any circumstance.⁷¹

Where a Federal employee's position entails the entrustment of sensitive information in the performance of his or her official duties, intentional attempts to evade taxes by preparing a fraudulent return casts question upon the good judgment, ethics and trustworthiness so essential to the employee's position.⁷² It is immaterial in these instances whether such sensitive information is actually disclosed by such an employee.⁷³

In a matter where certain New York City police officers allegedly failed to properly file their tax returns, the Federal prosecutor minced few words about the seriousness of a police officer intentionally disobeying the tax laws.⁷⁴ Police

employees on the same basis as those of any other persons. See 4 U.S.C. §§ 104-111 (1995).

⁶⁹ See George Guttman, *The Tax Compliance of Federal Government Employees*, TAX NOTES TODAY, Mar. 18, 1996, at 1589, available in LEXIS 96 TNT 55-8.

⁷⁰ *Gipson v. Veterans Admin.*, 682 F.2d 1004, 1011 (D.C. Cir. 1982). The *Gipson* case, in citing various examples of falsifying government records, referred, *inter alia*, to *Rotolo v. Merit Sys. Protection Bd.*, 636 F.2d 6, 8 (1st Cir. 1980), where an IRS employee was removed for filing a tax return which claimed improper deductions and failed to report income. *Id.*

⁷¹ *Id.*; *Gomez v. Social Sec. Admin.*, 70 M.S.P.R. 257, 265 (M.S.P.B. 1996); *Scott v. Department of Justice*, 69 M.S.P.R. 211, 242-44 (M.S.P.B. 1995), *aff'd*, 99 F.3d 1160 (Fed. Cir. 1996); *Gillen v. Smithtown Library Bd. of Trustees*, 10/16/97 N.Y.L.J. 33, (cols. 3-4) (Sup. Ct. Suffolk Co.).

⁷² *Brandt v. Department of the Navy*, 22 M.S.P.R. 36, 39-40 (M.S.P.B. 1984), *aff'd*, 856 F.2d 202 (Fed. Cir. 1988) (upholding the revocation of an employee's top security clearance for having been convicted on felony tax evasion charges).

⁷³ *Id.*

⁷⁴ Don Van Natta, Jr., *600 City Employees Suspected in a Plot for Evading Taxes*, NEW YORK TIMES, July 18, 1996, at B-5 (quoting U.S. Attorney Mary Jo White):

That these defendants are police officers sworn to uphold the law makes the crimes charged all the more galling and offensive. . . . Those in law enforcement have a heightened duty to obey all the laws and to set an example for others, not to brazenly declare that they are somehow above the law.

Id. The matter involved fifteen current or former New York City police officers arrested on Federal charges of failure to file income tax returns. *Id.* Mayor Rudolph Giuliani (himself

officers clearly have some sort of enhanced duty to file their personal tax returns, though there remains some limited room for argument as to the degree of this enhanced duty.⁷⁵ Firefighters likewise can be held to the fulfillment of their personal tax obligations as a condition of their continued employment.⁷⁶

At least one state has been upheld in its removal of a professional educator for a tax fraud conviction, recognizing the nexus of such an offense to the position's requirement of moral turpitude as a model to young school students.⁷⁷

Elected officials, who ostensibly serve as role models for their constituents, can also be said to have an enhanced duty to file their tax returns and otherwise comply with the tax laws.⁷⁸ In the words of one Federal prosecutor, "[i]t's particularly troubling to see people who were once given significant public trust who have violated tax laws that we're all supposed to follow."⁷⁹ Indeed, being a taxpayer has,

a former United States Attorney) said investigation was continuing on as many as 600 additional City employees. *Id.*; cf. Robert E. Kessler, *15 Cops Arrested in Tax Case*, *NEWSDAY*, July 18, 1996, at A 6 (report of same news event attributes a similar but not verbatim quotation to U.S. Attorney White).

The fifteen current or former police officers allegedly asserted "tax protester" arguments in the tax return documents, and in their statements before the Federal Magistrate. For discussion of tax protesters, see *infra* notes 117-126 and accompanying text.

⁷⁵ See *Crawford v. Department of the Treasury*, 56 M.S.P.R. 224, 227 (M.S.P.B. 1993); *Mitchell v. United States Postal Serv.*, 32 M.S.P.R. 362, 365-66. (1987). For a discussion of the *Crawford* and *Mitchell* decisions, see *supra* note 66.

⁷⁶ See, e.g., *Pisano v. McKenna*, 466 N.Y.S. 2d 231 (N.Y. Sup. Ct. 1983) (dismissing firefighter for sales tax violations in connection with his personal business venture).

⁷⁷ *Logan v. Warren County Bd. of Educ.*, 549 F. Supp. 145 (S.D. Ga. 1982) (upholding removal of school principal after conviction on charges of submitting false documents to the IRS).

⁷⁸ See, e.g., *In re Gribetz*, 646 N.Y.S. 2d 279 (N.Y. App. Div. 1996) (disbarring a county District Attorney because he had willfully failed to disclose certain income on his Federal tax returns).

Elected officials are also held to a higher standard by the courts in the conduct of their personal tax affairs. See, e.g., *Blanton v. Commissioner*, 74 T.C.M. (CCH) 1100, 1106 (1997) (taxpayer who was Governor of Tennessee and a former U.S. Congressman was held to higher standard regarding imposition of civil tax fraud penalty).

⁷⁹ Liam Plevin, *Tax Indictment: Two Ex-officials in Brookhaven Accused of Evasion*, *NEWSDAY*, Sept. 28, 1994, at A 5 (quoting Assistant U.S. Attorney Alan Vinegrad's comment on indictment of two former Brookhaven town elected officials). Mr. Vinegrad (or any other Assistant U.S. Attorney) would be hard pressed to empathize with tax evaders in light of the specific personal tax compliance requirements imposed upon Federal prosecutors, see 28 C.F.R. § 45.735-15 (1996), which requires all employees of the

in the past, been a requirement for the holding of certain elective offices.⁸⁰ Also, the willful failure to properly report income on a tax return has been cause for removal of a judge from the bench.⁸¹

III. PERSONNEL ADMINISTRATION ISSUES

Several personnel administration issues are relevant as governmental agencies attempt to enforce their employees' fulfillment of their ever-complicative and ambiguous tax law obligations. The public agency which attempts such enforcement may well be confronted with one or more of the following issues discussed in this section.

A. Confidentiality of Tax Returns

Specific information about an individual's tax returns now enjoys a special privilege of confidentiality.⁸² The American system of voluntary tax compliance⁸³

Department of Justice, including Assistant U.S. Attorneys, to fulfill their personal, State, and Federal tax obligations, and which is a reiteration and amplification of the tax compliance requirements imposed generally upon all Federal employees in the Executive Branch. *See supra* notes 68-69 and accompanying text.

⁸⁰ *Darrow v. People*, 8 P. 661, 663-64 (Colo. 1885), *reh'g denied*, 8 P. 924 (Colo. 1885); *Jones v. Darby*, 161 S.E. 835, 837 (Ga. 1932); *State v. McDonald*, 145 So. 508 (Miss. 1933); *Sathre v. Quickstad*, 268 N.W. 683 (N.D. 1936). The *Jones* and *McDonald* cases involved a requirement that the elected official qualify as an elector, coupled with the requirement that an eligible elector be a taxpayer. Accordingly, the rulings in *Jones* and *McDonald* have lost much, if not all, precedential value in the wake of subsequent legal developments such as the 24th Amendment to the U.S. Constitution, and Supreme Court decisions in cases such as *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966) (invalidating the poll tax as a requirement for voting in state and local elections), and *Kramer v. Union Free School Dist. No. 15*, 395 U.S. 621 (1969) (issue of whether owning or leasing taxable real property is a valid requirement for voting in an election).

Darrow and *Sathre*, on the other hand, involved requirements that holders of certain offices be payers of property taxes, and did not deal with requirements for voting in such elections. In any event, there is an obvious and significant difference between a requirement to own or lease real property as a condition to holding elective office on one hand, and a requirement to attend to the filing of all tax returns which may be obligatory on the other.

⁸¹ *E.g.*, *Steinberg v. State Comm. on Judicial Conduct*, 409 N.E.2d 1378 (N.Y. 1980).

⁸² I.R.C. § 6103 (West 1998). Prior to 1977, individual income tax returns were treated as public records whose disclosure was limited to certain specific situations, the interpretation of which was subject to great latitude of administrative discretion. The Tax Reform Act of 1976, P.L. 94-455, § 1202, instituted a new approach, specifying that tax

is vitally dependent upon the confidential safekeeping of taxpayer and tax return information by the taxation authorities.⁸⁴ The Internal Revenue Code specifically regulates the disclosure of information in IRS files,⁸⁵ and provides sanctions against those who make improper disclosure.⁸⁶ Law in the various states likewise provides for confidentiality of tax returns.⁸⁷

returns, and the information contained in them, was confidential information which was subject to strict safeguards in its disclosure, including a provision that the IRS could not disclose tax return information to any state or Federal government agency which had not specifically adopted certain safeguards to keep the information confidential. The new approach effectively removed much of the varying administrative interpretations regarding tax return confidentiality which had theretofore prevailed.

Historically, the first effective Federal income tax, instituted to help finance the Civil War, had no specific confidentiality provisions and in fact provided that "lists, valuations and enumerations . . . may be examined; and said lists shall remain open for examination for the space of fifteen days after notice shall have been given . . ." Act of July 1, 1862, 12 Stat. 432, 437. From that time until the Tax Reform Act of 1976, the confidentiality of tax returns waxed and waned according to various prevailing political and administrative forces and sentiments. For a detailed account of the tax return confidentiality practices and theories in force prior to the Tax Reform Act of 1976, see S. DOC. NO. 94-266, chap. 6 at 821-1135 (1975).

⁸³ See *supra* note 19 and accompanying text.

⁸⁴ See, e.g., *Crown Cork & Seal Co. v. Pa. Human Relations Comm.*, 463 F. Supp. 120, 122-23 (E.D. Pa. 1979); *State Dep't. of Taxation & Finance v. State Dep't. of Law*, 378 N.E.2d 110 (N.Y. 1978); James H. Tully, Jr., *State Tax Secrecy Laws and Federal Grand Jury Subpoenas in Non-Tax Investigations*, 46 ALBANY L. REV. 78-83 (1981); see also INTERNAL REVENUE SERVICE, ESTATE AND GIFT TAX LAW FOR ATTORNEYS, STUDENT TEXT UNIT 1 at 32-3 (IRS Training Material 3129-22, TPDS 85576 (January 1986)) ("Effective tax administration and the maintenance of taxpayer compliance and public confidence in the tax system will depend in large measure on how effectively you handle this trust [of confidentiality].").

⁸⁵ I.R.C. § 6103 (West 1998).

⁸⁶ I.R.C. § 7213 provides that unauthorized disclosure of taxpayer-specific data is criminal offense. I.R.C. § 7213 (West 1998); see also *U.S. v. Richey*, 924 F.2d 857 (9th Cir. 1991).

I.R.C. § 7216 criminalizes as a misdemeanor the improper disclosure of tax return information by private tax return preparers. I.R.C. § 7216 (West 1998).

⁸⁷ E.g., GA. CODE ANN. § 48-2-15 (1991); LA. REV. STAT. ANN. § 47:1508 (West 1990); N.Y. TAX LAW § 202 (McKinney 1996); PHOENIX, ARIZ. TAX CODE § 14-510 (<<http://www.ci.phoenix.az.us/plt/artv.html#bm14510>) (visited Oct. 10, 1997); see also *King v. Mobile Home Rent Review Bd.*, 265 Cal. Rptr. 624 (1989); *Finance Comm'n v. Commissioner of Revenue*, 417 N.E.2d 945 (Mass. 1981); Bruce D. Goldstein, *Confidentiality and Dissemination of Personal Information: An Examination of State Laws Governing Data Protection*, 41 EMORY L. J. 1185 (1992).

In view of the privileged nature of individuals' tax affairs, the disclosure of tax returns is most strongly disfavored by the courts, and will only be compelled where the information to be gained therefrom is indispensable to the resolution of the case and such information is not reasonably available from other sources.⁸⁸ Even where tax returns are discoverable, the courts have permitted them to be sanitized of employer identification numbers and other personal data not germane to the issues being litigated.⁸⁹

Any interest of the government, as an employer, in its employees' personal tax returns must be cogent enough to outweigh the confidentiality accorded generally to personal tax returns. The accession by a government agency of an employee's tax return is a sensitive matter under any circumstances, and will invariably raise questions of propriety if done in any manner or time other than those clearly defined in procedure and/or clearly warranted for compelling security reasons.⁹⁰

B. Detecting the Nonfiler Employees

The IRS makes an annual check of its computer records to verify that its employees have filed returns.⁹¹ The data from such a check may be misleading, however. The "classic example" is a female IRS employee who, having been employed by the IRS for a number of years and having duly filed her tax returns,

⁸⁸ *E.g.*, *DeMasi v. Weiss*, 669 F.2d 114, 119-20 (3d Cir. 1982); *Ex Parte Morris*, 530 So.2d 785 (Ala. 1988); *Active Fire Sprinkler Corp. v. American Home Assurance Co.*, 609 N.Y.S. 2d 663, (App. Div. 1994); *Briton v. Knott Hotels Corp.*, 489 N.Y.S. 2d 186 (App. Div. 1986); *Sprague v. Walter*, 656 A.2d 890, 914-15 (Pa. Super. Ct. 1995), *app. denied* 673 A.2d 336 (Pa. 1996); *Estate of Borman*, 8/12/96 N.Y.L.J. 33, (col. 2) (Surr. Ct. Nassau Co.); *Estate of Cramer*, 10/18/95 N.Y.L.J. 32, (col. 5) (Surr. Ct. Westchester Co.); *In re Kraus*, 8/15/94 N.Y.L.J. 33, (col. 5) (Surr. Ct. Westchester Co.).

The sealing of estate tax returns required to be filed with the Surrogate's Courts in New York is an issue which, pending adoption of a statewide policy, was resolved by one Surrogate by ordering the returns in question to be sealed except to those having a legal need to access the information. *Estate of Wildstein*, 1/15/97 N.Y.L.J. 28, col. 1 (Surr. Ct. Bronx Co.).

⁸⁹ *See, e.g.*, *Estate of Charnoff*, 5/15/96 N.Y.L.J. 29.; *cf. Rosenfeld v. Kaplan*, 666 N.Y.S.2d 180, (App. Div. 1997) (ordering the defendant's discovery of the plaintiff's redacted tax returns.).

⁹⁰ *See, e.g.*, *IRS Inquiry Preceded Firing*, *NEWSDAY*, July 4, 1996, at A17 (request by White House for an IRS records check of White House usher Christopher B. Emery aroused questions of propriety).

⁹¹ *See Guttman, supra* note 43, at 598; David Cay Johnston, *Tax Compliance Isn't Perfect Among Workers at I.R.S.*, *NEW YORK TIMES*, May 1, 1995, at D1.

gets married and files a joint return under her husband's Social Security number which is not detected by the IRS computer record check.⁹² Moreover, the IRS computer system has been known to make errors,⁹³ and mishandling of taxpayer returns is not unknown.⁹⁴ It is not difficult to imagine imperfections in the IRS's annual computer check of its employees, including instances where the employee in question makes a geographic move.

IRS employees are, of course, subject to examinations of their prior tax returns as conditions of their employment.⁹⁵ A new IRS hire who, being fresh out of college, had never earned sufficient income to necessitate filing an Income Tax Return might conceivably be misidentified as the subject for disciplinary action.

Where the employee is employed by an agency other than the IRS, the tax filing data is no longer firsthand information and thus, there obviously would be all the more potential for misidentification of the employee as the subject of disciplinary action for nonfiling.

C. Proper Reporting of Income and Complexity of the Tax Law

Even where the tax return is timely filed, there remains the question of whether

⁹² Johnston, *supra* note 92, at D1.

Married taxpayers may file a joint income tax return. I.R.C. § 6013 (West 1998). For a discussion of other problems involving joint returns, see *infra* notes 111-16 and accompanying text.

⁹³ See, e.g., *Husby v. United States*, 672 F.Supp. 442 (N.D. Calif. 1987); Ryan J. Donmoyer, *IRS Computers Behind Many Return Rejections*, TAX NOTES TODAY, Apr. 3, 1995, at 16, available in LEXIS 95 TNT 61-2.

⁹⁴ See, e.g., Richard E. Harris, *IRS Memos Confirm Mishandling of Tax Returns*, TAX NOTES TODAY, Nov. 12, 1985, at 559; Kenneth H. Ryesky, *Analysis of the Split Authority on Proof of a Postmark under Internal Revenue Code § 7502*, 21 U. OF DAYTON L. REV. 379, 391 n.n. 70-71 (1996).

⁹⁵ At the time the author was employed by the IRS, that agency had a Form 5012 (11/80), "New Employee Tax Verification," upon which an IRS job applicant certified whether Federal income tax returns were timely filed and taxes timely paid during the prior three years. The information thus supplied by the applicant was then verified by the IRS. (Copy of author's Form 5012 on file with author). During the author's interview for employment with the IRS (10/19/87), he was given a sheet of paper entitled "Information to be Given to Applicants during Interview," which highlighted as a "negative" about the job the fact that prospective hiree's past tax returns would be audited (copy on file with author).

the correct tax is properly computed. Federal and state taxation⁹⁶ are extremely complex, specialized and esoteric areas of the law where material provisions are sometimes not codified in the Internal Revenue Code,⁹⁷ and even the codified exceptions to the rules have their own exceptions.⁹⁸ The Treasury Regulations which elucidate, explain and implement the Internal Revenue Code can likewise be confusing.⁹⁹ Tax law complexity has stymied even the most learned of judges.¹⁰⁰

⁹⁶ State taxation statutes generally follow the scheme of the Internal Revenue Code in computing the parameters such as gross income and allowable deductions. *See, e.g.*, N.Y. TAX LAW § 612 (McKinney 1987); MASS. GEN. LAWS ANN. ch. 62, §§ 2-3 (West 1998); *see also In re Cohn*, 96 B.R. 827 (N.D. Ill. 1988); *Zenith Indus. Corp. v. Department of the Treasury*, 394 N.W.2d 451, 453 (Mich. App. 1986) (“The Michigan legislature ‘piggybacked’ the state corporate income tax scheme on the Internal Revenue Code.”); GENERAL ACCT. OFF., REPORT TO THE COMMISSIONER OF INTERNAL REVENUE: TAX ADMINISTRATION: FEDSTATE EFFORTS OFFER OPPORTUNITIES BUT PROGRAM NEEDS IMPROVEMENT, REPORT NO. GAO/GGD-97-16, Oct. 31, 1996, *available in* LEXIS 96 TNT 214-7.

Moreover, many state statutes explicitly defer to Federal redeterminations of such parameters. *E.g.*, N.Y. TAX LAW § 659 (McKinney 1988); ILL. REV. STAT. ch. 120, § 5-506(b); Kenneth H. Ryesky, *When Must New York Abide by a Federal Estate Tax Audit?*, N.Y. ST. BAR J., July/August 1994, at 32.

⁹⁷ *See, e.g., In re Hickok*, 552 N.Y.S. 2d 49 (App. Div. 1990), *leave to appeal denied*, 565 N.E.2d 516 (N.Y. 1990), which deals with an uncoded tax statute, § 403(3) of Pub. L. 97-34, the Economic Recovery Tax Act of 1981 (“ERTA”). ERTA revised I.R.C. § 2056 to provide for an unlimited marital deduction with respect to Estate and Gift taxes. *Id.* Prior to 1982, the marital deduction was limited to the greater of \$250,000 or one-half the adjusted gross estate by the *old* I.R.C. § 2056. Accordingly, the phrase “maximum marital deduction allowable” or similar terminology had a different meaning in 1980 than in 1990. ERTA § 403(3) provided a transitional rule for certain wills or trusts applying a marital deduction formula which were executed prior to September 12, 1981. The transitional rule was never codified into the Internal Revenue Code. The issue of pre-ERTA wills remains a complex one. *Compare Hickok*, 552 N.Y.S. 2d 49, with *In re Murphy*, 10/20/92 N.Y.L.J. 26. (Pre-ERTA will clause “. . . maximum amount allowable as the marital deduction . . .” construed by the Court as full marital deduction.); *see also* Gregory V. DiCenso, *Handling the Unlimited Marital Deduction in Pre-ERTA Instruments*, PRACTICAL TAX LAWYER, Fall 1993, at 63.

⁹⁸ *See, e.g.*, I.R.C. § 2035, “Adjustments for certain gifts made within 3 years of decedent’s death.” I.R.C. § 2035 (West 1998). The general rule in § 2035(a) includes such transfers in a decedent’s estate. §§ 2035(b) and 2035(d) are statutory exceptions to the general rule set forth in § 2035(a). §§ 2035(d)(2) and 2035(d)(3), however, set forth *exceptions* to the exceptions provided in §§ 2035(b) and 2035(d).

⁹⁹ *See, e.g., United States v. Neal*, 93 F.3d 219, 223 (6th Cir. 1996).

[Treasury Regulation] Section 31.6011(a) is potentially confusing because it reads

So confusing are the tax laws that high-ranking IRS employees have admitted engaging professionals to prepare their tax returns, for fear of making errors.¹⁰¹

circularly: an employer is required to make a return if it is required to make a return. Nonetheless, it is clear upon a close reading of the regulation that the word 'return' is used interchangeably to mean both (1) a remittance of taxes withheld from employees, and (2) a specific form or statement documenting information required by the Secretary. Applying these meanings to § 31.6011(a), an employer who has to 'make a return' (send a remittance) of taxes withheld shall 'make a return' (file a statement) on Form 941.

Id.

¹⁰⁰ See, e.g., Judge Learned Hand, *Thomas Walter Swan*, 57 YALE L.J. 167, 169 (1947): [T]he words of the such an act as the Income Tax, for example, merely dance before my eyes in a meaningless procession: cross-reference to cross-reference, exception upon exception — couched in abstract terms that offer no handle to seize hold of — leave in my mind only a confused sense of some vitally important, but successfully concealed purport, which it is my duty to extract, but which is within my power, if at all, only after the most inordinate expenditure of time.

Id.; see also *Cheek v. United States*, 498 U.S. 192, 199-200, (1991) ("The proliferation of statutes and regulations has sometimes made it difficult for the average citizen to know and comprehend the extent of the duties and obligations imposed by the tax laws."); *Friedman v. Commissioner*, 53 F.3d 523, 525 (2d Cir. 1995) (In the "bewildering world of tax shelter deductions, few experts, let alone laypersons, easily discern the difference between a fraudulent scheme and an exceptionally advantageous legal loophole in the tax code."); *Houston Textile Co. v. Commissioner*, 173 F.2d 464, 464 (5th Cir. 1949) ("This petition brings up for solution one of those difficult jigsaw tax law puzzles all too common in the present deplorable crazy quilt patchwork state of the Internal Revenue laws."); *In re Air Disaster at Lockerbie, Scotland* on Dec. 20, 1988, 37 F.3d 804, 818 (2d Cir., 1994), *cert. denied*, *Pan American World Airways, Inc. v. Pagnucco*, 513 U.S. 1126 (1995) ("We see no reason that would prompt us to view heavily regulated air carriers ... the same as individual taxpayers who face the daunting task of unraveling the complexities of the Internal Revenue Code."); *United States v. McCullough*, 94-1 U.S.T.C. (CCH) ¶ 50,280 (S. D. Ill. 1994) at 84, 127 (Judge Gilbert described Internal Revenue Code as "confusing and at times contradictory . . .").

In view of the judiciary's oft-conceded difficulty with the Internal Revenue Code, it is hardly surprising that some sections of the Code are given diverse interpretations and constructions among the various courts. See generally Ryesky, *supra* note 94.

¹⁰¹ Joy Vestal, *Newsmaker: Carol Landy*, NEWSDAY, Apr. 11, 1995, at A22 (quoting Carol Landy, Director of the Internal Revenue Service Center, Brookhaven (Holtsville), NY: "I don't do my own tax return. I'm afraid to make a mistake."); Christopher Cox, *Good Question*, FORBES, Jan. 1, 1996, at 30, reproduced in InfoTrac microfilm reel No. Bus. 84-E-2073 (Information Access Co.) (Then Internal Revenue Commissioner Fred Goldberg reportedly admitted to Rep. Christopher Cox (R. Calif.) to engaging an accountant to prepare his personal income tax returns.); Tom Herman, *Tax Report; A Special Summary and*

While government agencies can and do require their employees to timely and correctly file and pay their taxes, to what extent can or should a government agency make a determination as to whether an employee's tax return was properly completed in light of the tax laws high degree of specialization? Put another way, what business has a taxpayer's employer in insinuating itself amidst a conflict between the taxpayer and the IRS (or state taxation authority)?

Where the employer is the IRS or a state taxation authority, there is not much room to question the employer's qualifications for determining whether a tax return was properly completed. For non-taxation agencies, however, the issue can be significant.

That a government agency other than a taxation authority ought not make a determination of whether a tax return was properly completed is illustrated by *Shea v. Civil Service Commission*.¹⁰² *Shea* involved a revenue collections supervisor for the Illinois Department of Revenue who had run into difficulty due to certain defalcations by his ex-wife, of which *Shea* apparently had neither knowledge nor involvement.¹⁰³ In dismissing Mr. *Shea* from his employment, the Illinois Civil Service Commission made a determination that *Shea* had, inter alia, failed to comply with the state tax laws.¹⁰⁴ The court agreed with Mr. *Shea* that the Illinois Civil Service Commission did not have the authority to make a determination of a tax deficiency, which it impliedly did in determining that Mr. *Shea* had failed to comply with the tax laws.¹⁰⁵

A non-taxation government agency is thus caught in a bind: While there is good reason for the agency to require, under compulsion of discipline, that its employees comply with the tax laws, such an agency can be fettered in the prompt administration of its disciplinary prerogative by having to defer to a decision process (which might include an appellate process) of a separate agency.

Forecast of Federal and State Tax Developments, WALL ST. J. Apr. 15, 1998, at A1 (new IRS Commissioner Charles Rossotti admitting that he has not prepared his own tax returns since the 1970's, and indicating that time pressures will likely compel him to continue to engage a professional tax preparer now that he has joined the IRS as Commissioner.). It is certainly not imprudent for an IRS employee to engage professional help in preparing a personal income tax return, given the fact that an error on such a return can trigger disciplinary action against the IRS employee. See *supra* note 43 and accompanying text.

¹⁰² 586 N.E.2d 512 (Ill. App. Ct. 1991), *app. denied*, 591 N.E.2d 31 (Ill. 1992).

¹⁰³ *Id.* at 513-14.

¹⁰⁴ *Id.* at 514. There were other unrelated matters involved in disciplining Mr. *Shea*, including the failure to obtain approval for outside employment.

¹⁰⁵ *Id.*

Another problem involving the complexity of the tax law is that certain technicalities in the tax law give rise to events where the taxpayer, with no ill intent, is not in a position to pay the tax due. Examples of this type of problem include debt forgiveness and involuntary mortgage foreclosures.¹⁰⁶ Whether and what type of discipline should be imposed upon a Federal employee in such a position can pose some difficult questions.¹⁰⁷

D. Spouse's Income

Married taxpayers may, and often do, elect to file joint returns for their personal income taxes.¹⁰⁸ Currently, spouses who so file are jointly and severally liable for the total amount of the tax due,¹⁰⁹ though there are some rather stringent provisions for the so-called "innocent spouse" relief.¹¹⁰ Absent a viable "innocent spouse" defense, however, each spouse is liable for any additions or changes to the tax return in question which might be made by the IRS subsequent to the filing,

¹⁰⁶ A gain over the basis of property involved in an involuntary mortgage foreclosure constitutes income notwithstanding the fact that the mortgagor might actually receive no proceeds from the event. *See, e.g., Helvering v. Hammel*, 311 U.S. 504 (1941).

¹⁰⁷ *See Monterosso v. Department of the Treasury*, 6 M.S.P.R. 684 (M.S.P.B. 1981). *Monterosso* involved a GS-3 IRS mail clerk who, upon audit of his return, incurred an involuntary constructive capital gain on a mortgage foreclosure. *Id.* at 690. The clerk found himself in a position of owing an income tax attributable to the transaction, but having no money with which to pay it.

¹⁰⁸ I.R.C. § 6013 (West 1998).

¹⁰⁹ I.R.C. § 6013(d)(3) (West 1998).

¹¹⁰ I.R.C. § 6013(e) (West 1998); *see also* John J. Tigue, Jr. & Linda A. Lacewell, *The 'Innocent Spouse' defense -- Ignorance Is Not Bliss*, 11/16/95 N.Y.L.J. 3. One may qualify for "innocent spouse" relief with respect to a portion of the tax in question, but be ineligible for such relief with respect to the remainder of the tax. *See, e.g. Morris v. Commissioner*, 72 T.C.M. (CCH) 1042 (1996); *Barrett v. Commissioner*, 57 T.C.M. (CCH) 458, 471-72 (1989).

By the time the matter comes to the courts, the one claiming to be an innocent spouse is often an ex-spouse. *See, e.g., Crowley v. C.I.R.*, 70 TCM (CCH) 1374 (1995), *aff'd by, Cockrell v. C.I.R.*, 116 F.3d 1472 (2d. Cir. 1997), *cert. denied*, 118 S. Ct. 1163 (1998); *Berman v. Commissioner*, 66 T.C.M. (CCH) 1798 (1993), *aff'd*, 47 F.3d 1158 (2d Cir. 1995); *Barrett*, 57 T.C.M. (CCH) 458; *Hill v. Commissioner*, 60 T.C.M. (CCH) 163 (1990).

In response to the excesses which the IRS had been known to resort to in cases such as *Cockrell*, Congress amended I.R.C. § 6013 to give greater relief to spouses in tax collection situations through the Internal Revenue Service Restructuring and Reform Act, Pub. L. 105-206, Act § 3201, 112 Stat. 734-40 (1998). Despite the liberalization of § 6013, joint liability for taxes reported on joint income tax returns remains an issue.

regardless of which spouse's acts or omissions gave rise to the adjustment.¹¹¹ One can encounter significant problems in connection with one's spouse's errors and omissions in dealing with the government.¹¹²

The filing of a joint return has in fact given rise to the discipline of public employees due to tax return errors or omissions attributable to the spouses of such employees.¹¹³ It is not clear that a uniform standard is used determining whether discipline is to be meted out to public employees whose spouses stray from their tax reporting duties, however, Federal employees who have interposed in their disciplinary proceedings a defense analogous to the "innocent spouse" defense have

¹¹¹ See, e.g., *Dolan v. Commissioner*, 44 T.C. 420 (1965). Congress, concerned with certain unfair aspects of the joint and several liability provisions, directed the Secretary of the Treasury and the Comptroller General (General Accounting Office) to conduct separate studies on the matter. Pub. L. 104-168 § 401, 110 Stat. 1452 (1996). The General Accounting Office submitted the Comptroller General's report on Mar. 12, 1997, more than a month past the Jan. 30, 1997 deadline set forth by Congress in the statute. GEN. ACCT. OFF., REPORT TO THE COMMITTEE OF WAYS AND MEANS, HOUSE OF REPRESENTATIVES, AND THE COMMITTEE ON FINANCE, U.S. SENATE: TAX POLICY: INFORMATION ON THE JOINT AND SEVERAL LIABILITY STANDARD, REPORT NO. GAO/GGD-97-34, Mar. 12, 1997 available in LEXIS 97 TNT 49-20).

For its part, the Treasury Department was even more remiss in meeting the Jan. 30, 1997 deadline for conducting and reporting its study to Congress. The Treasury report was not submitted until Feb. 9, 1998, more than a year past the deadline. U.S. TREAS., REPORT ON JOINT LIABILITY AND INNOCENT SPOUSE ISSUES (Feb. 9, 1998). It is clear from the Treasury's Report that the document was a cooperative venture between the Treasury Department itself and the IRS, with the IRS pulling the laboring oar. The Treasury's (read "IRS's") delinquency in that regard can only stoke public cynicism towards the IRS and ill serves to maintain the voluntary compliance so important to the American system. Cf. *supra* notes 38-42 and accompanying text.

¹¹² Being married to a wrongdoer can entangle a person into significant legal troubles, tax-related or otherwise. See, e.g., David Johnston, *C.I.A. Officer Takes Deal for Life Term in Spy Case*, NEW YORK TIMES, Apr. 27, 1994, at A12 (discussing criminal charges against spouses of Aldrich Ames and Jonathan Pollard, two Federal employees who were involved in espionage incidents: both respective spouses had gotten entangled in their husbands' illegal acts, and would in fact serve time in prison); James Brooke, *Congresswoman Faces Increasing Skepticism*, NEW YORK TIMES, Jan. 22, 1996, at A10 (discussing the damage to political career of Utah Congresswoman Enid Greene Waldholtz on account of her husband's defalcations).

¹¹³ See, e.g., *Micali v. Department of the Treasury*, 56 M.S.P.R. 127 (M.S.P.B. 1992); *Monaco v. Department of the Treasury*, I.R.S., 15 M.S.P.R. 727 (M.S.P.B. 1983); *Department of Revenue v. Smith*, 501 N.E.2d 1370 (Ill. App. Ct. 1986).

found relief in the *degree of discipline* imposed.¹¹⁴

The issue of where to draw a line between one's personal domestic situation and one's public employment has no clear cut solutions, and no immediate prospects of abating. It will likely remain a problem with respect to a public employee's tax obligations as long as there is any form of joint spousal tax liability and so long as government agencies continue to employ married individuals.

E. Tax Protesters

'Tax protesters' have convinced themselves that wages are not income, that only gold is money, that the Sixteenth Amendment is unconstitutional, and so on. These beliefs all lead — so tax protesters think — to the elimination of their obligation to pay taxes. The government may not prohibit the holding of these beliefs, but it may penalize people who act on them.¹¹⁵

Participants in the so-called "tax protest movement" have gone to any and all extremes to impede the orderly administration of the American taxation system. Quite commonplace is the repeated litigation by non-filers of tax deficiencies in the Tax Court,¹¹⁶ and the imposition of frivolous arguments and rationale for defeating taxes.¹¹⁷ Tax protesters have been known to take even more extreme and vexatious

¹¹⁴ See *Boyce v. United States*, 543 F.2d 1290 (Ct.Cl. 1976).

¹¹⁵ *Coleman v. Commissioner*, 791 F.2d 68, 69 (7th Cir. 1986).

¹¹⁶ See, e.g., *Burnett v. Commissioner*, 68 T.C.M. (CCH) 811, 813 (1994) ("Petitioner testified that he has not filed a tax return since 1980, and plans to litigate each and every notice of deficiency he receives with the same arguments."); *Webb v. Commissioner*, 66 T.C.M. (CCH) 1273 (1993), *aff'd*, 46 F.3d 1149 (9th Cir. 1995).

¹¹⁷ E.g., *Partos v. Commissioner*, 62 T.C.M. (CCH) 560 (1991) (tax protester contended that payment of the Federal income tax was voluntary); *Buske v. Commissioner*, 75 T.C.M. (CCH) 1627 n.2 (1998) (taxpayer also contended that the Internal Revenue Code does not apply outside of the District of Columbia); *Verbeck v. Commissioner*, 72 T.C.M. (CCH) 204 n.2 (1996), *aff'd*, 108 F.3d 1387 (9th Cir. 1997) (tax protester argued that he was an American citizen but not a United States citizen, and therefore, the U.S. Government had no right to tax him); *Fox v. Commissioner*, 65 T.C.M. (CCH) 1831, 1833 (1993), *aff'd*, 69 F.3d 543 (9th Cir. 1995) (tax protestor argued that he is a sovereign individual nonresident alien and therefore not liable for the taxes); *United States v. Ware*, 608 F.2d 400 (10th Cir. 1979) (tax protestor argued that his income was in Federal Reserve Notes and not dollars, that Federal Reserve Notes are mere promises to pay, and that any income must be paid in specie and not promises); *Lowman v. Commissioner*, 74 T.C.M. (RIA) 97,574 (1997) (petitioner contended that the tax law was unenforceable because the symbol "\$" used to specify the taxes was undefined and ambiguous); *Nulsen v. Commissioner*, 62 T.C.M. (CCH) 915 (1991) (tax protester asserted argument that he was not liable for the tax because

actions.¹¹⁸

In the case of the common citizen, it is not always clear when one crosses the oft-blurred line between availing oneself of one's Constitutional rights and illegally evading one's taxes. One may dislike paying one's taxes, and may even write notes and letters expressing disparagement for the IRS.¹¹⁹ Even the public expression that citizens should assert their rights against IRS is permissible.¹²⁰ Nevertheless, a citizen or resident is required to file the prescribed tax returns with the Federal and State taxation authorities. Such tax returns must inform the IRS (or other taxation authority) of the taxpayer's tax liability as computed in good faith according to the tax laws and regulations, and a document which, without good cause, has a primary purpose of informing the taxation authority of the filer's intention to not pay the tax, even if styled as a "tax return" and even if prepared on actual tax return forms, is not a "tax return" for the purposes of the tax return filing requirement.¹²¹

the Form 1040 Instructions booklet did not have an Office of Management and Budget (OMB) number); *Eilertson v. Department of the Navy*, 23 M.S.P.R. 152, 157 (M.S.P.B. 1984), *aff'd*, 770 F.2d 179 (Fed. Cir. 1985) (tax protestor, a civilian employee of the Navy, who had argued that any legislation imposing taxes on income is "repugnant to the Constitution" and constitutes an unlawful act of Congress, was removed for filing W-4 forms claiming false exemption from withholding); *Avery-Carter v. Commissioner*, 66 TCM (CCH) 1596 (1993) (Petitioner contended that African-Americans had no duty to file tax returns); *Hill v. Commissioner*, 70 T.C.M. (CCH) 13 (1995) (Petitioner argued that Native Americans had no duty to file tax returns).

¹¹⁸ See, e.g., *United States v. Ekblad*, 732 F.2d 562 (7th Cir. 1984) (tax protestor had filed liens against the property personally owned by certain IRS employees); *United States v. Thomas*, 819 F. Supp. 927 (D. Colo. 1993); *United States v. Hart*, 545 F.Supp. 470 (D. N.D. 1982), *aff'd & sanctions imposed for frivolity*, 701 F.2d 749 (8th Cir. 1983) (tax protestor enjoined from performing his threatened *posse comitatus* arrests of individual IRS agents); *United States v. Lorenzo*, 995 F.2d 1448 (9th Cir. 1993) *cert. denied sub nom.*, *Brown v. United States* 510 U.S. 882 (1993) (Tax protesters submitted false Forms 1099 to IRS showing false taxable income supposedly earned by certain IRS agents and judges, causing such IRS agents and judges to suffer consequent entanglement with IRS concerning their personal tax affairs); see also S. REP. No. 494, 97th Cong., 2d Sess. 277-78 (1982), *reprinted in* 1982 U.S.C.C.A.N. 781, 1023-25; U.S. DEPT. OF JUSTICE, TAX DIV., CRIMINAL SECTION, CRIMINAL TAX MANUAL (1994), § 40; MARCUS FARBEINBLUM, *THE IRS AND THE FREEDOM OF INFORMATION AND PRIVACY ACTS OF 1974* 43-56 (1991).

¹¹⁹ See *supra* note 17 and accompanying text.

¹²⁰ *Fleischner v. Commissioner*, 70 T.C.M. (CCH) 413, 416 n.3 (1995) (finding that a letter published in the San Diego Evening Tribune suggesting that taxpayers assert Fourth and Fifth Amendment rights against the IRS was not a badge of fraud).

¹²¹ See *In re Greatwood*, 194 B.R. 637, 640 (B.A.P. 9th Cir. 1996) *aff'd* 120 F.3d 268 (9th Cir. 1997); see also U.S. DEPT. OF JUSTICE, TAX DIV., CRIMINAL SECTION, CRIMINAL TAX

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Moreover, there is a difference between illegal tax evasion and legitimate tax avoidance.¹²² There is no patriotic duty to increase ones taxes.¹²³ There is, however, clear imperative for disciplinary action when a government employee crosses the fence and enters into the tax protester camp, particularly when such a government employee espouses the position that the government itself is not a legitimate sovereign government. Differentiating between good faith creative tax planning or free expression on one hand, and illegal tax evasion activity on the other, is a potential problem in enforcing a government employee's duty to accurately file a tax return. The stakes are high, for toleration by a government of tax protesters among its work force can only have deleterious effects upon employee discipline and morale, and upon public respect for the government.¹²⁴ Striking the sensitive balance between a public employee's rights and his or her tax obligations is a necessary process, yet it carries high potential for conflict and confusion.

F. Employee Workplace Rights

Though they have certain special responsibilities, Government employees do have personal and workplace rights which the government must honor. The personal tax obligations of government employees can give rise to issues of such rights.

All of the ethical and aspirational considerations which dictate that public employees comply with the tax laws would be rendered laughable and meaningless if, while the nonfiler government employee remains on the public payroll, the very government which employs the nonfiler is unable to collect the tax money it is owed. That being so, there remains an essential public interest in the rights of public employees which the government must protect. Those two considerations do have the potential for conflict.

Such a conflict arose in *Levitt v. Board of Collective Bargaining*.¹²⁵ In *Levitt*, the New York State Court of Appeals ruled that the unilateral dictation by the City

MANUAL (1994), § 40.02[2].

¹²² *Friedman v. Commissioner*, 53 F.3d 523, 525 (2d Cir. 1995) (commenting on the difference between a fraudulent scheme and a loophole in the tax code).

¹²³ *Helvering v. Gregory*, 69 F.2d 809, 810 (2d Cir. 1934), *aff'd*, 293 U.S. 465 (1935).

¹²⁴ *Eilertson v. Department of the Navy*, 23 M.S.P.R. 152, 157 (M.S.P.B. 1984); *see also* Van Natta, *supra* note 74; Kessler, *supra* note 74 (apparent participation among New York City police officers in a tax protest scheme); Brief for Respondent, *Kooi*, 517 N.Y.S. 2d 601 (No. 53842), *supra* notes 37, 55-58 and accompanying text.

¹²⁵ 589 N.E.2d 1 (N.Y. 1992).

of New York that its employees agree to repay their public debts in order for continued employment was an unfair labor practice.¹²⁶

Though *Levitt* appears to hobble the New York City government in its collection of revenues owed by its own employees, it would appear that managerial solutions to the problem are available to the City. For one thing, there is little doubt that an employee who falsely represents in writing that he or she has no such tax debts would be subject to discipline, including removal, for making false statements.¹²⁷ Moreover, if the employee in question failed to *file* the tax returns, that too might serve as a basis for discipline.¹²⁸

As discussed earlier, another issue is the employee's right of confidentiality with respect to his or her personal tax affairs.¹²⁹ For the employee in a non-taxation governmental agency, the confidentiality issue has its implications as to what tax return information one's employer has a right to know; and even in a taxation agency such as the IRS there are implications as to what business one's lineal supervisor has in knowing the details of one's personal tax return. In that regard, it must be noted that there is a difference between disclosing taxpayer return information¹³⁰ on one hand, and disclosing the fact that a return was or was not filed on the other. If only the fact of filing is disclosed, with no disclosure of any taxpayer return information, then the dynamics of public embarrassment would selectively affect only those who did not comply with the law, and who could avoid such embarrassment by timely filing the required tax returns. Accordingly, public

¹²⁶ *Id.* at 922-23. However, a questionnaire requiring disclosure of such debts and disclosure of whether city income tax returns were filed was not an unfair labor practice. *Id.* Because the New York City Resident Income Tax is computed, filed, administered and collected in conjunction with the New York State Income Tax returns, a New York City resident who files a New York City income tax return would normally file a New York State return in the process. *Id.*

¹²⁷ *See, e.g., Williams v. United States*, 434 F.2d 1346 (Ct. Cl. 1970); *Moran v. Baxter*, 597 N.Y.S. 2d 688 (App. Div. 1993).

¹²⁸ *See Kooi v. Chu*, 517 N.Y.S. 2d 601 (App. Div. 1987) (discussed *supra* note 55 and accompanying text.) Though the *Kooi* case involved removal of employees involved in the taxation function, the same arguments advanced by the government in *Kooi* could be used to substantiate some form of discipline, even if, *arguendo*, it is a sanction short of removal.

¹²⁹ For discussion of confidentiality of tax returns, see *supra* notes 83-91 and accompanying text.

¹³⁰ For purposes of Federal tax return confidentiality, I.R.C. § 6103(b)(3) explicitly defines "taxpayer return information" in terms of "return information" as defined in I.R.C. § 6103(b)(2), which in turn is defined in terms of "return" as defined in I.R.C. § 6103(b)(1).

See I.R.C. § 6103(b)(1)-(3) (West 1998).

disclosure of the fact of filing (or lack thereof) actually serves to encourage the governmental objective of voluntary compliance with the tax laws.¹³¹

Yet another workplace rights issue involves potential abuses in selectively enforcing the employees' tax obligations. The complexity of the tax law is such that any government employee whose income picture (or that of such employee's spouse) involves more than simple wages and interest will run the risk of calculating a tax which differs from that calculated by the IRS (or a state taxation authority) in an audit situation. Where an employee (or spouse thereof) operates a business venture, the potential for audit is obviously enhanced. The potential for abuse in this area is all the more relevant where the government employee's agency is the IRS itself, in view of the particularly rigid standards to which IRS employees are held in their own tax affairs.¹³²

G. Encouraging and Facilitating the Filing of Returns by Government Employees

Given the strong governmental interest in having all Government employees discharge their personal tax obligations, it would be most appropriate for the Government to encourage and facilitate voluntary compliance among its workforce.¹³³ In practice, however, the Government does not always meet that ideal.

For reasons of efficiency, the IRS has sought to encourage the electronic filing of personal income tax returns.¹³⁴ The IRS was able to clearly link its providing means for its employees to electronically file their personal income tax returns with

¹³¹ Kooi, 517 N.Y.S. 2d at 601.

¹³² For discussion of the "Berthod standard" applied to employees of the IRS, see *supra* note 43 and accompanying text.

¹³³ Cf. ADAM SMITH, THE WEALTH OF NATIONS 778 (Edwin Cannan, ed., Modern Amer. Library 1937) (1789), Book V, Chapt. II, Pt. II at 778 ("[Maxim number] III. Every tax ought to be levied at the time, or in the manner, in which it is most likely to be convenient for the contributor to pay it .").

¹³⁴ See, e.g., GEN. ACCT. OFF., REPORT TO THE SENATE COMMITTEE ON GOVERNMENTAL AFFAIRS, TAX ADMINISTRATION: FILING FALLING SHORT OF EXPECTATIONS REPORT NO. GAO/GGD-96-12 (Oct. 31, 1995) available in LEXIS 95 TNT 226-33; Ryan J. Donmoyer, Richardson: TaxLink Users will Merge Automatically with EFTPS, TAX NOTES TODAY Dec. 4, 1996, at 1147, available in LEXIS 96 TNT 235-2 (IRS Commissioner has high expectations for increases in Electronic Federal Tax Payment System usage). Congress has adopted and endorsed the IRS objective to maximize the electronic filing of tax returns through the Internal Revenue Service Restructuring and Reform Act, Pub. L. No. 105-206, Act §§ 2001-03, 112 Stat. 783 (1998).

its tax-related mission, and was accordingly granted permission by the Comptroller General to use appropriated funds for the same.¹³⁵ The fact that the individual IRS employees would derive personal benefit from the program was determined by the Comptroller General to be merely incidental to the IRS benefit.¹³⁶

On the other hand, agencies other than the IRS were not permitted to use appropriated funds to provide their employees with means for electronic filing, absent statutory authority or a demonstration that such a program would be reasonably related to the agency's purposes and mission.¹³⁷

The Comptroller General's reluctance to permit agencies to expend appropriated funds to facilitate employee tax return filings is somewhat puzzling. Government agencies regularly make provisions for their employees to participate, on government time and with government facilities, in personal activities such as voting, Savings Bond campaigns, blood donations, charity drives, and jury service.¹³⁸ Government agencies are specifically permitted to use appropriated funds to purchase publications such as the *Federal Employees News Digest* and the *Federal Employees Almanac*.¹³⁹ For some reason, however, there is a deep-seated

¹³⁵ 71 Comp. Gen. 28 (1991).

[Electronic filing] will facilitate IRS tax collection efforts by improving its efficiency in processing returns, and will result in cost savings to the government, both in the processing of returns and the training of employees. Further, the program will allow the IRS to demonstrate the feasibility and accuracy of the technology, thus, promoting corporate sponsorship of employee electronic filing systems and encouraging the public-at-large to accept a new mechanism for filing returns.

Id. at 30.

¹³⁶ *Id.*

¹³⁷ Comptroller General's Opin. No. B-259947 (Nov. 28, 1995), available in 1995 WL 697995 (C.G.).

¹³⁸ See, e.g. INTERNAL REVENUE SERVICE, NATIONAL AGREEMENT BETWEEN INTERNAL REVENUE SERVICE AND NATIONAL TREASURY EMPLOYEES UNION Arts. 31.1 at 52: 36 at 57-58 (IRS Document 6647, July 1989) (hereinafter NORD III); AGREEMENT BETWEEN STATE OF WISCONSIN AND AFSCME COUNCIL 24, WISCONSIN STATE EMPLOYEES UNION, AFL-CIO Art. 11, § 20 at 120-21 (administrative leave time for employee blood donations), Art. 13, § 11 at 157-58 (jury service or appearance as a witness), Art. 13, § 12 at 158 (voting time). During the author's employment with the Federal government, he had occasion to "voluntarily" serve as the representative in his work group for the Savings Bond Drive and the Combined Federal Campaign, and, while serving in a supervisory position for the Federal government, to designate subordinates who "volunteered" for those same duties as such representatives.

¹³⁹ 55 Comp. Gen. 1076 (1976).

reluctance, if not resistance, to allowing government employees similar use of governmental resources in order to attend to their personal tax affairs.¹⁴⁰

IV. CONCLUSION:

It is clear that the tax law is growing increasingly complex.¹⁴¹ As the tax laws become increasingly complex, more and more citizens will become entangled in tax traps and the voluntary compliance rate among the population will decrease.¹⁴² Moreover, discord and dysfunction within the taxation bureaucracies can only increase with the complexity of the tax law.¹⁴³

¹⁴⁰ Cf. United States Army Tank Automotive Command and AFGE Local 1659, 93 Lab. Arb. (BNA) 767, 769 (Smith, Arb., 1989) The Army attempted to discipline a civilian employee for entering a personal "tax program" on a government computer. *Id.* "A supervisor credibly testified that he would have been against the decision to demote except that a tax program was involved. He was unaware that it was irrelevant that a tax program was involved." *Id.* But cf. NORD III, *supra* note 138, Art. 31.4 at 58, which provides that IRS employees be accorded administrative leave to attend to personal tax audits.

¹⁴¹ See *supra* notes 1-4 and accompanying text.

¹⁴² See *supra* note 4 and accompanying text.

¹⁴³ See Adam Smith, *supra* note 133.

[Maxim] II. The tax which each individual is bound to pay ought to be certain and not arbitrary. The time of payment, the manner of payment, the quantity to be paid, ought to be clear and plain to the contributor, and to every other person. Where it is otherwise, every person subject to the tax is put more or less in the power of the tax-gatherer, who can either aggravate the tax upon any obnoxious contributor, or extort, by the terror of such aggravation, some present or perquisite to himself. The uncertainty of taxation encourages the insolence and favours the corruption of an order of men who are naturally unpopular, even where they are neither insolent nor corrupt. The certainty of what each individual ought to pay is, in taxation, a matter of so great importance, that a very considerable degree of inequality, it appears, I believe, from the experience of all nations, is not near so great an evil as a very small degree of uncertainty.

Id. at 778.

Recent events have indicated that Smith's admonition remains valid today. As an example, the IRS is specifically prohibited from evaluating the performance of tax collection personnel on the basis of dollars collected. Technical and Miscellaneous Revenue Act of 1988 ("TAMRA"), Pub. L. No. 100-647, § 6231, 102 Stat. at 3342, *reprinted at* 1988-3 C.B. 394. Nevertheless, a decade after the enactment of that provision, it was found to be frequently honored in the breach, with the consequent abuses to the taxpayer. See, e.g., *IRS Quota Use Widespread*, *NEWSDAY*, Jan. 15, 1998, at A50. Indeed, serious questions remain as to whether the IRS is able to meaningfully control the abuse of taxpayers by its own employees and agents. See, e.g., GEN. ACCT. OFF., PUB. NO. GAO/T-GGD-98-63, *TAX*

Accordingly, the incidence and saliency of public employees' special tax law compliance obligations issues can be expected to increase in the coming years. At least two factors will likely give such issues increased exposure. First of all, the increasing numbers of individuals who run afoul of the tax laws will sweep across all segments of society and will likely include public employees along with everyone else. Secondly, there will be increased pressures upon governmental agencies and offices to take all necessary measures to promote voluntary compliance.¹⁴⁴ Government agencies will thus find it increasingly difficult to ignore the issue, regardless of whether the Internal Revenue Code, as we know it today, remains in force.

Both internal managerial and external public image concerns dictate that government agencies first bring order to their own houses. Accordingly, making an example of an errant employee will likely prove to be a convenient and effective way to address both internal and external imperatives to promote voluntary compliance with the tax laws.

In enforcing order within their own camps, government agencies will need to be mindful of employee privacy and due process rights. Some sort of balance must be struck. The intramural and/or public disclosure of the fact that a given employee has or has not timely filed his or her tax returns, without disclosing any information from the tax returns themselves, would serve well to encourage voluntary compliance among agency personnel and the public while honoring the law-abiding employee's personal rights.

ADMINISTRATION: IRS INSPECTION SERVICE AND TAXPAYER ADVOCATE ROLES FOR ENSURING THAT TAXPAYERS ARE TREATED PROPERLY (Feb. 5, 1998), *available in* LEXIS 98 TNT 25-32 (testimony before Senate Committee on Finance by Lynda D. Willis, Director, Tax Policy & Admin. Issues).

For its part, the United States Congress has long had the propensity to knowingly legislate statutes which exacerbate the uncertainty of computing the amount of tax due and owing. In *Edwards v. Slocum*, 287 F. 651, 654 (2d Cir. 1923), *aff'd*, 264 U.S. 61 (1924), decided two decades prior to the invention of the automatic sequence electronic computer, the court found that Congress did not intend to necessitate the use of a complex interrelated mathematical calculation in computing the amount of the Federal estate tax. *Id.* at 654. Shortly following the Supreme Court's affirmation, Congress rejected such rationale in enacting the Revenue Act of 1924. *See* S.398, 68th Cong., 1st Sess. 35, *reprinted in* 1939-1 C.B. (pt. 2) 266, 290.

¹⁴⁴ GEN. ACCT. OFF., PUB. NO. GAO/T-GGD-97-35, TAXPAYER COMPLIANCE: ANALYZING THE NATURE OF THE INCOME TAX GAP 1 (Mar. 1997) (Complex tax laws can lead to more noncompliance by taxpayers.).

Ricardo observed that taxation “frequently operates very differently from the intention of the legislature by its indirect effects.”¹⁴⁵ The implication of public employees into disputes and disciplinary procedures on account of personal taxation matters is surely an indirect effect of taxation which does not match the intent and expectations of Congress.

The issue of public employee compliance with the tax laws cannot be expected to go away any time soon. To the contrary, it can be expected to pose many challenges to both tax administration and public personnel administration. During the uncertain times ahead, federal and state government agencies and offices which educate their employees as to the tax law obligations and facilitate the filing of tax returns, in a manner respectful of the employees’ privacy rights, will serve the best interests of the employee, agency and public alike.

¹⁴⁵ DAVID RICARDO, *THE PRINCIPLES OF POLITICAL ECONOMY AND TAXATION* 157 (J. M. Dent & Sons 1969) (1817); *also printed in* 1 *THE WORKS AND CORRESPONDENCE OF DAVID RICARDO* 239 (Piero Sraffa, ed., Cambridge Univ. Press 1951).
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